Office - Supreme Court, U.S.
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JOHN T. FEY, Clerk

No. 514

TRANSCRIPT OF RECORD

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT.

No. 16,238

EDGAR W. STOKES,

Appellant,

versus

CONTINENTAL ASSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(ORIGINAL RECORD RECEIVED JUN. 29/56.)

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On May 19, 1954 PETITION FOR REMOVAL together with all exhibits (excepting thereto the summons and sheriff's return, pursuant to Designation) was filed in the words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION.

No. 5607 M-Civil.

EDGAR W. STOKES,

Plaintiff,

versus

CONTINENTAL ASSURANCE COMPANY, an Illinois corporation, doing business in Dade County, Florida,

Defendant.

Comes now the above named defendant, Continental Assurance Company, an Illinois corporation, by its undersigned attorneys, and presents and files its petition for the removal of this action from the Civil Court of Record in and for Dade County, Florida, in which Court this action is pending, to the District Court of the United States, in and for the Southern District of Florida, Miami Division, being the district and division within which this action is pending, and shows unto the Court as follows:

1. That this action was commenced in the Civil Court of Record, in and for Dade County, Florida, on the 29th day of April, 1954; that the defendant was

served with process and the complaint in said action by the Sheriff of Dade County, Florida, on the 30th day of April 1954.

2. That this action is one of a civil nature of which the District Court of the United States has original jurisdiction, in that it involves a controversy between citizens of different states, and the amount of the controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand ($3,000.00) Dollars.

3. That the plaintiff is, and was at the time of the institution of this action, a citizen and resident of the State of Florida.

4. That the defendant, Continental Assurance Company, is, and was at the time of the institution of this action, a corporation created and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in Chicago, Illinois.

5. Petitioner files herewith a bond with good and sufficient surety, under the statute in such cases made and provided, conditioned that the defendant will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this action was not removable or was improperly removed.

6. Upon the filing of this petition and said bond, your petitioner will give written notice thereof to all adverse parties.

7. A copy of this petition has this date been filed with the Clerk of the said Civil Court of Record in and for Dade County, Florida.

8. Petitioner attaches hereto and files herewith a copy of all process, pleadings and orders served upon and by it in this action in said Civil Court of Record, as well as a transcript of the entire proceedings in said cause in said Civil Court.

9. The time within which this petition is required to be filed has not yet expired.

Wherefore, petitioner prays that this Court take jurisdiction of this action, and that the removal of this action to this Court be hereby effected.

ROBERT F. UNDERWOOD and
KNIGHT, SMITH & UNDERWOOD,
Attorneys for Defendant,
(S.) ROBERT L. UNDERWOOD
804 Ingraham Bldg.,
Miami 32, Florida

State of Florida,
County of Dade. ss.

Before me, the undersigned authority, this day personally appeared Robert F. Underwood, who, being first duly sworn says:

That he is a member of the law firm of Knight, Smith & Underwood, Attorneys of record for the defendant; and he is authorized to and does make this affidavit for and on behalf of said defendant; that he

has read the foregoing petition, and that the matters and things therein stated are true.

(S.) ROBERT L. UNDERWOOD.

Sworn to and subscribed before me this 19th day of May, 1954.

(S.) K. M. DERSHIMER,
Notary Public, State of Florida at Large.

(Notary Seal.)

My commission expires 7-30-56.

COMPLAINT.

Filed Apr. 29, 1954 W. Cecil Watson, Clerk.

In the Civil Court of Record, in and for Dade County, Florida.

Edgar W. Stokes, Plaintiff,

vs. No. 60381.

Continental Assurance Company, an Illinois corporation, doing business in Dade County, Florida, Defendant.

The plaintiff, Edgar W. Stokes, sues the defendant, Continental Assurance Company, an Illinois corporation, authorized to do business in Florida and doing business in Dade County, Florida, and alleges:

1. Plaintiff's cause of action hereinafter set forth involves a claim in excess of Five Hundred Dollars

($500.00), but does not exceed, exclusive of interest and costs, the sum of Five Thousand Dollars ($5,000.00).

2. That heretofore and on or about the 15th day of June 1927, in consideration of the payment by the plaintiff to the defendant of the annual premium of $54.15 the defendant made and delivered to the plaintiff its policy signed and executed by its duly authorized officers and did therein and thereby promise and agree that in the event the plaintiff sustained bodily injury caused by accidental means, or from sickness, resulting in his total disability from continuing his occupation and profession as a physician, to pay to the plaintiff a monthly indemnity of One Hundred Fifty Dollars ($150.00) per month during the period of such disability, all of which more particularly appears from a photostatic copy of said policy hereto attached and made a part hereof.

3. That thereafter from time to time said policy of insurance was renewed and extended by the payment of the annual premium of $54.15 and in particular was renewed for the period of one year from the 15th day of June, 1951 by the payment of such premium and at the time of the sustaining of the accident by plaintiff as hereinafter alleged was in full force and effect.

4. That on or about the 26th day of February, 1952, the plaintiff received bodily injury solely through accidental means in that plaintiff was seriously and permanently injured in an automobile accident which said injuries did totally disable plaintiff from continuing his said occupation from the time of said acci-

dent to the present; and at the present time the plaintiff continues to be totally disabled from continuing his said occupation.

5. That plaintiff has duly performed all of the conditions of such policy of insurance on his part; and plaintiff has been duly compensated by the defendant under the terms of said policy through and including September 10, 1952.

6. That since September 10, 1952 the defendant has refused to make any and all further payments under said policy, although payment thereof has been duly demanded; and although, at the request of the defendant, the plaintiff has submitted himself to be examined repeatedly by physicians representing the defendant.

7. That as a result of the foregoing there is now due and owing to the plaintiff from the defendant upon said policy of insurance the sum of One Hundred Fifty Dollars for the months commencing September 10, 1952, October 10, 1952, November 10, 1952, December 10, 1952, January 10, 1953, February 10, 1953, March 10, 1953, April 10, 1953, May 10, 1953, June 10, 1953, July 10, 1953, August 10, 1953, September 10, 1953, October 10, 1953, November 10, 1953, December 10, 1953, January 10, 1954, February 10, 1954, March 10, 1954, and April 10, 1954, or a total now due and owing of Three Thousand Dollars ($3,000.00) plus interest.

8. That the plaintiff has been required to employ counsel to prosecute this action and, therefore, as authorized and provided in Section 625.08, Florida

Statutes, demands a reasonable sum as fees or compensation for his attorneys in the amount of Seven Hundred Fifty Dollars ($750.00).

9. That this action was not commenced within sixty days after giving to the defendant due proof of the disability of plaintiff, aforesaid, and has not been begun within one year after the happening of the accident hereinabove alleged.

Wherefore, the plaintiff demands judgment against the defendant in the amount of Four Thousand Dollars ($4,000.00) and for the costs of this litigation as same be ultimately determined at the conclusion of this cause.

SAMS & GOLDMAN,
Attorneys for Plaintiff,
1335 duPont Building,
(S.) PHILLIP GOLDMAN,
Of Counsel.

This policy provides indemnity for loss of limb, limbs, sight or time resulting from bodily injury effected through accidental means or from sickness; all to the extent herein provided.

[P. 8]

The Continental Assurance Company

INCORPORATED BY THE STATE OF ILLINOIS AS A STOCK COMPANY

HOME OFFICE:

CHICAGO, ILLINOIS.

HEREINAFTER CALLED THE COMPANY

Hereby Insures

Mr. _____ hereinafter called the Insured, against loss of _____ limbs, sight of _____ eyes, time from bodily injury effected through accidental means or from sickness, all as herein limited and provided.

"Bodily Injury" as herein used means a bodily injury which is effected solely through accidental means while this policy is in force. "Sickness" as herein used means a sickness contracted and commencing while this policy is

NON-CANCELLABLE INCOME POLICY

FORM NO. L-555 A

No. D [illegible]

IN THE

Continental Assurance Company

CHICAGO, ILLINOIS

ISSUED TO

This policy provides indemnity for loss of limb, limbs, sight or time resulting from bodily injury effected through accidental means or from sickness all to the extent herein provided.

Attention is called to the fact that no Monthly Indemnity is payable under the provisions of paragraph D of Part I for the first part of any period of disability

On May 19, 1954 MOTION TO DISMISS was filed in the words and figures as follows:

(Title Omitted.)

Comes now the defendant, by its undersigned attorneys, and moves the Court to dismiss the complaint upon the ground that said complaint does not state a claim against this defendant upon which relief can be granted.

ROBERT F. UNDERWOOD and
KNIGHT, SMITH & UNDERWOOD,
Attorneys for Defendant,
By ROBERT F. UNDERWOOD.

804 Ingraham Bldg.,
Miami 32, Florida.

On August 20, 1954 ANSWER COUNTER-CLAIM AND DEMAND FOR JURY TRIAL of Defendant was filed in the words and figures as follows:

(Title Omitted.)

Comes Now the defendant Continental Assurance Company, by its undersigned attorneys, and for answer to the Complaint and each count and paragraph thereof, says:

1. The defendant specifically denies each and every allegation of said Complaint and each para-

graph thereof, separately and severally, except as herein expressly admitted.

2. The defendant admits the allegations of paragraph 1 of said Complaint except that the amount in controversy, exclusive of interest and costs, is in excess of $3,000.00.

3. Answering paragraph 2 of said Complaint, the defendant admits the execution and delivery of the policy of insurance described in said paragraph, and admits that the photostatic copy of the policy attached to the Complaint is a true copy of the original. The defendant, however, denies that it promised and agreed to pay the plaintiff a monthly indemnity in the event the plaintiff sustained bodily injury caused by accidental means, or other sickness resulting in his total disability from continuing his occupation and profession as a physician as alleged in said paragraph. On the contrary, by the terms of said policy the defendant agreed to pay the plaintiff a monthly indemnity "if the insured is disabled by bodily injury or by sickness so as to suffer a total loss of all his business time".

4. The allegations of paragraph 3 of said Complaint are admitted.

5. The allegations of paragraphs 4, 5, 6, 7, 8 and 9 of said Complaint are hereby expressly denied.

6. For a further defense, the defendant says that the disability of the plaintiff, if any, did not come within the promise or undertaking of the defendant as prescribed in said policy of insurance so as to

1. Total Loss of Time. Said Monthly Indemnity will be paid for the period of such total loss of time which immediately succeeds the expiration of the said excepted period, and also will be paid for any subsequent period or periods of such total loss of time if the Insured is entitled to indemnity for partial loss of time, as hereinafter provided, during the entire interval between the periods of total loss of time.

2. Partial Loss of Time. One-half of said Monthly Indemnity will be paid for any period or periods during which the Insured is unable to perform work substantially essential to the duty or duties of his occupation provided that in such instance the period of such partial disability immediately succeeds a period of total loss of time for which indemnity is payable under the preceding provisions of this paragraph D, and further provided that indemnity for such period or periods of partial disability will not be paid for more than a total of six months during any continuous disability.

E. Hospital Indemnity.

If the Insured by reason of bodily injury or sickness shall be under treatment and also be resident in a licensed hospital, the Company will pay, in addition to whatever other indemnity may be payable under this policy, twenty-five per cent of said Monthly Indemnity for the continuous period of such residence and treatment, commencing at the first day thereof and not exceeding three months, during which he is disabled from performing all the duties of his occupation, but such indemnity will not be paid for more than one period as the result of any one accident or disease nor for more than one period during any continuous disability.

Attention is called to the fact that no Monthly Indemnity is payable under the provisions of paragraph D of part I for the first part of any period of disability.

Part II. Indemnity for Operations

If injury or sickness sustained by the Insured and covered by this policy shall necessitate any surgical operation named in the schedule endorsed hereon, the Company will pay the sum therein specified in addition to the indemnity otherwise given, but such payment shall not be made for more than one operation as the result of any one accident or disease, nor for more than one operation during any continuous disability.

Part III. Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured or contracts sickness after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable.

Part IV. Additional Provisions

21 The Insured has the right by the payment of premium as herein provided to keep this policy continuously in force until its anniversary date nearest his sixtieth birthday Payments of renewal premium must be made to the Company at its Home Office in Chicago or to any authorized agent of the Company on or before their respective due dates as herein stated but after the payment of premium for any year a grace of 30 days shall be granted for the payment of all premium thereafter becoming due and during such period of grace the insurance hereunder shall continue in force. No premium receipt is valid unless signed by the President or a Vice President or the Secretary or an Assistant Secretary of the Company.

22 After any default in payment of premium, this policy may be reinstated as provided in standard provision number three at any time within six months from the date of such default on written application by the Insured to the Home Office of the Company and the payment of the defaulted premium, provided the Insured shall submit with such application evidence of insurability satisfactory to the Company.

23. This insurance does not cover, (1) women; (2) disability resulting wholly or partly, directly or indirectly from (a) bodily injury sustained or sickness contracted while the Insured is in military or naval service in time of war; (b) bodily injury or sickness caused by war or by any act of war; (c) bodily injury sustained or sickness contracted while he or on any vehicle or mechanical device for aerial navigation or while falling therefrom or therewith or while operating or handling any such vehicle or device or while participating in or in consequence of having participated in aeronautics in any form; (d) bodily injury sustained or sickness contracted except while the Insured is within Canada or Europe or the United States (not including Alaska, Panama Canal Zone or the insular possessions of the United States) or while traveling between them by regular lines of passenger conveyance.

24. If the age of the Insured is misstated in the application for this policy, the indemnities payable hereunder shall be those which the premium paid would have purchased at the correct age according to the Company's premium rates; except, that if the true age of the Insured at the time of application is over fifty-five, the policy shall be null and void and the Company shall return all premium received less any indemnity paid prior to the ascertainment of the correct age. Indemnity for disability will not be paid under this policy at a rate in excess of the average earnings of the Insured for the period of time that he has been actually employed during the two years immediately preceding the commencement of disability for which the Company is liable. All premium paid during said two years for that portion of the disability indemnity in excess of the amount thus determined will be returned upon request of the Insured. The Insured shall have the right to reduce the monthly indemnity of this policy on any anniversary of the date hereof and upon his request and the surrender of this policy, the Company will issue in lieu thereof a like policy as of the same date with the desired reduction and a proportionate reduction in premium.

25. No indemnity will be paid for any period of disability during which the Insured is not under the regular care and attendance of a legally qualified physician other than himself, but this provision will be waived by the Company in all cases where the disability results from loss of limb, limbs or sight as before defined and in all other cases upon receipt of proof satisfactory to it that the disability is both total and permanent for life, or that medical attendance is unnecessary. The allowance of indemnity for total or partial permanent disability under the provisions of either of paragraphs A, B or C of Part I shall proportionately reduce the monthly indemnity payable for all other loss or disability thereafter occurring. Failure to comply with any of the provisions of this policy shall render invalid any claim under this policy.

26 After the first twelve months of disability, no indemnity shall be payable under the provisions of paragraph D or E of Part I for any period during which the Insured is not continuously within the United States (not including Alaska, the Panama Canal Zone or the insular possessions of the United States) or Canada unless a written permit to reside elsewhere be granted by the Company.

27 At any time during the life of this policy, if the Insured changes his occupation to one different from that stated in this policy, the Company hereto agrees upon the surrender of this policy to issue in lieu thereof, upon the written request of the Insured, a new policy containing the same provisions as this policy and providing such an amount of like indemnities as the premium paid for this policy will purchase at the rates but within the limits fixed by the Company for such different occupation

28 No assignment of interest under this policy and no waiver or change of any of its provisions shall be valid unless approved by the President or Secretary of the Company and such approval endorsed hereon The Company shall not be responsible for the validity of any assignment.

29 This policy is issued in consideration of the statements and agreements contained in the application therefor and the payment of premium as herein provided A copy of the said application is hereto attached or hereon endorsed and is hereby made a part of this contract No provision of the charter or by-laws of the Company not included herein shall avoid the policy or be used in any legal proceedings thereunder.

30 The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive, shall bar all right to recovery under this policy

HEREINAFTER CALLED THE COMPANY

Hereby Insures

Mr. ---------- hereinafter called the Insured,

against bodily injury effected through accidental means or from sickness all as herein limited and provided

"Bodily Injury" as herein used means a bodily injury which is effected solely through accidental means while this policy is in force. "Sickness" as herein used means a sickness contracted and commencing while this policy is in force.

The Monthly Indemnity of this policy is ---------- Dollars.

This policy is not subject to cancellation nor to alteration, change or amendment without the consent of the Insured and after one year from its date it shall be incontestable as to the time of origin of any disability commencing thereafter.

Part I. Indemnity for Loss of Limb, Limbs, Sight or Time

Loss as used hereinafter with reference to hand or hands, foot or feet means complete severance at or above the wrist or ankle joint so that no part of the hand or foot remains and as used with reference to the eye or eyes, means the irrecoverable loss of the entire sight thereof.

A. Loss of Two Limbs or the Sight of Both Eyes.

If the Insured shall suffer the Loss of Both Hands or of Both Feet or of One Hand and One Foot or of the Sight of Both Eyes as a result of either bodily injury or sickness, such loss shall be deemed to cause a permanent loss of all of his business time thereafter and the Company will pay said Monthly Indemnity as long as he shall live.

B. Loss of One Limb.

If the Insured shall suffer the Loss of One Hand or of One Foot as a result of either bodily injury or sickness, the Company will pay said Monthly Indemnity so long as such loss necessarily and continuously causes him to lose all of his business time. Such loss shall further be deemed to cause him to lose permanently twenty-five per cent of his business time thereafter and the Company will pay twenty-five per cent of said Monthly Indemnity as long as he shall live.

C. Loss of the Sight of One Eye.

If the Insured shall suffer the Loss of the Sight of One Eye as a result of either bodily injury or sickness, the Company will pay said Monthly Indemnity so long as such loss necessarily and continuously causes him to lose all of his business time. Such loss shall further be deemed to cause him to lose permanently ten per cent of his business time thereafter and the Company will pay ten per cent of said Monthly Indemnity as long as he shall live.

D. Loss of Business Time.

If the Insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time without indemnity therefor becoming due under the provisions of either of paragraphs A, B or C of this Part, and if further such total loss of all business time continues as such without change for more than

---------- hereinafter called the excepted period, the Company will pay indemnity for the loss of business time occurring thereafter as follows:

bodily injury effected through accidental means or from sickness all to the extent herein provided.

11

SCHEDULE OF OPERATIONS

(Indemnities for Surgical Operations—See Part II

If the Monthly Indemnity named in the Policy is $500.00 the amounts payable shall be the respective amounts named below. If, less than $500.00 the payments shall be reduced proportionately

APPENDICITIS, see Laparotomy	$250.00
AMPUTATION OF	
Foot, Hand or Forearm	125.00
Leg, or Arm Above Elbow	250.00
Thigh	250.00
Aneurism (Tumor of Artery) Ligation	125.00
Bone Abscess Trephining	75.00
Bronchotomy, Thyrotomy, Laryngotomy, Laryngotracheotomy, or Tracheotomy	125.00
Cancer, Extirpation	250.00
DISLOCATION, REDUCTION OF	
Shoulder, Elbow, Hip, Knee or Ankle	75.00
EXCISION OF	
Shoulder, Hip or Knee Joint	250.00
Elbow, Wrist or Ankle Joint	125.00
Eye—Enucleation	125.00
FRACTURES, REDUCTION OF	
Nose, Lower Jaw, Collar Bone or Shoulder Blade	50.00
Breast Bone	50.00
Rib or Ribs	50.00
Upper Arm	75.00
Forearm (one or both Bones)	50.00
Wrist	50.00
Any of the Bones of the Pelvis or Sacrum	150.00
Cox[illegible]	50.00
Thigh	125.00
Knee Cap or Leg Bones (one or both)	125.00
Ganglion (Nerve) Removal	75.00
Goitre—Cutting Operation for Radical Cure	150.00

GUNSHOT WOUNDS	
Treatment not necessitating Amputation or Laparotomy	50.00
Hydrocele Tapping Incision or Excision of Sac	50.00
Hydrophobia Pasteur Treatment	75.00
Kidney Fixation or removal	200.00
Laparotomy opening of the abdominal cavity for an operation on any organ contained therein or for Traumatic Peritonitis or Exploratory Incision	250.00
Lithotomy Operation for removal of Stone in bladder any cutting	250.00
Mastoiditis Operation for	175.00
Meningitis Trephining for drainage	250.00
Necrosis death of bone Sequestrotomy Removal of dead bone	75.00
Oesophagotomy for Stricture or other cause	250.00
Paracentesis Tapping of Abdomen or Bladder	75.00
RECTUM OPERATION FOR	
Hemorrhoids external or internal Excision or Ligation	50.00
Prolapsed Operation for	50.00
Fistula in Ano Incision	50.00
Polypus Extirpation	50.00
Malignant Stricture Excision or Colostomy	250.00
SKULL TREPHINING	
For Fracture	250.00
Synovitis inflammation of the lining membrane of a joint Incision	50.00
Tumor, Malignant Extirpation from any part of the body	175.00
Varicose Veins Ligation or Excision	50.00
Varicocele Acupressure Ligation or Excision	50.00

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured or contracts sickness after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the commencement of the loss for which the Company is liable.

2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness.

5. Such notice given by or on behalf of the Insured or beneficiary, as the case may be, to the Company at its Home Office in Chicago, Illinois, or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as was reasonably possible.

6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Company at its said office within ninety days after the termination of the period of disability for which the Company is liable.

8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

10. Upon request of the Insured and subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each thirty days during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. All the indemnities of this policy are payable to the Insured.

12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured, and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

18. The insurance under this policy shall not cover any person under the age of twenty years nor over the age of sixty-one years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

27 At any time during the life of this policy, if the Insured changes his occupation to one different from that stated in this policy, the Company hereto agrees, upon the surrender of this policy, to issue in lieu thereof, upon the written request of the Insured, a new policy containing the same provisions as this policy and providing such an amount of like indemnities as the premium paid for this policy will purchase at the rates but within the limits fixed by the Company for such different occupation.

28 No assignment of interest under this policy and no waiver or change of any of its provisions shall be valid unless approved by the President or Secretary of the Company and such approval endorsed hereon. The Company shall not be responsible for the validity of any assignment.

29 This policy is issued in consideration of the statements and agreements contained in the application therefor and the payment of premium as herein provided. A copy of the said application is hereto attached or hereon endorsed and is hereby made a part of this contract. No provision of the charter or by-laws of the Company not included herein shall avoid the policy or be used in any legal proceedings thereunder.

30 The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive, shall bar all right to recovery under this policy.

The Insured is by occupation a ----------[illegible]---------- classified by the Company as ----EXTRA PREFERRED---

The premium for this policy is ----------[illegible] /100---------- Dollars per year and is to be paid in advance as follows: a first premium of $ 54.15 at or before the delivery of the policy and $ 54.15 as a renewal premium on or before the ----------[illegible]---------- day of each ----------[illegible]---------- thereafter.

The date of this policy is [illegible] 19 27. Upon its countersignature it takes effect as of 12 o'clock noon Standard Time at residence of Insured of said date, provided the said first premium has then been paid in full, but otherwise it does not take effect until such premium has been so paid and the policy has been delivered to the Insured while he is free from injury and in good health. After taking effect it so continues to and including the due date of the first renewal premium stated above and then expires except as it may be continued by the payment of renewal premium for successive and consecutive terms of ----ONE YEAR---- each until its anniversary date nearest the sixtieth birthday of the Insured.

IN WITNESS WHEREOF, the CONTINENTAL ASSURANCE COMPANY has caused these presents to be signed by its President, but the same shall not be binding upon the Company unless signed by the Secretary or an Assistant Secretary and countersigned by a policy writer.

President

Asst. Secretary.

Countersigned and issued with Rider Form No. None at the Office of the Company
CHICAGO, ILLINOIS on the day of its date written above.

By [illegible]
Policy Writer

Countersigned at Louisville, Ky.
ALLEN M. READER & CO.
By [illegible]
Resident Agent

FORM NO. L-306 A

render the defendant liable for the monthly indemnity provided therein. The policy of insurance provides that the monthly indemnity shall be payable upon the happening of the following conditions—

"D. Loss of Business Time.

If the Insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time without indemnity therefor becoming due under the provisions of either of paragraphs A, B or C of this Part, and if further such total loss of all business time continues as such without change for more than—Three Months—(Hereinafter called the excepted period) the Company will pay indemnity for the loss of business time occurring thereafter as follows:

1. Total Loss of Time. Said Monthly Indemnity will be paid for the period of such total loss of time which immediately succeeds the expiration of the said excepted period, and also will be paid for any subsequent period or periods of such total loss of time if the Insured is entitled to indemnity for partial loss of time, as hereinafter provided, during the entire interval between the periods of total loss of time.

2. Partial Loss of Time. One half of said Monthly Indemnity will be paid for any period or periods during which the Insured is unable to perform work substantially essential to the duty or duties of his occupation provided that in each instance the period of such partial disability immediately succeeds a period of total loss of time for which indemnity is payable under the preceding provisions of this paragraph D,

and further provided that indemnity for such period or periods of partial disability will not be paid for more than a total of six months during any continuous disability.

E. Hospital Indemnity.

If the Insured by reason of bodily injury or sickness shall be under treatment and also be resident in a licensed hospital, the Company will pay, in addition to whatever other indemnity may be payable under this policy, twenty-five percent of said Monthly Indemnity for the continuous period of such residence and treatment, commencing with the first day thereof and not exceeding three months during which he is disabled from performing all the duties of his occupation, but such indemnity will not be paid for more than one period as the result of any one accident or disease nor for more than one period during any continuous disability."

Defendant avers that prior to the time of said automobile accident described in paragraph 4 of the Complaint, the said plaintiff retired from his practice as a physician and completely discontinued and abandoned such practice and sold a hospital located in Louisville, Kentucky which he previously owned and operated, and completely disassociated himself from the operation of said hospital, either directly or indirectly. At the time of the alleged automobile accident of February 26, 1952, the said plaintiff was not gainfully employed or engaged in any type of business or profession, or devoted any time to a business or profession, so that any claimed disability resulting from the said automobile accident did not cause

the said plaintiff "to suffer a total loss of all business time" so as to entitle him to monthly indemnity as provided in said contract of insurance.

The defendant further avers that the said plaintiff was not injured or disabled by the said automobile accident of February 26, 1952 so as to render him incapable or unfit to carry on his former business or occupation, nor was the claimed disability severe enough to cause him to "suffer a total loss of all business time" had he chosen to carry on his former business or occupation.

Counterclaim.

The defendant Continental Assurance Company, by its undersigned attorneys brings this counterclaim against Edgar W. Stokes and alleges:

1. This Court has already taken jurisdiction of this case pursuant to a removal of the case from the State Court on the grounds of diversity of citizenship and on the further grounds that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

2. The counterclaimant is a corporation organized and existing under the laws of the State of Illinois, is qualified to transact business in the State of Florida, and is engaged in the business of writing and entering into contracts of insurance and other business incident thereto.

3. On or about the 15th day of June 1927 the counterclaimant, by and through its duly authorized of-

ficers and agents, executed and delivered to the said Edgar W. Stokes a certain policy of insurance No. D30918, which said policy was thereafter from time to time renewed and extended so that said policy was in full force and effect on the 26th day of February, 1952, the date of the alleged accident more particularly set forth hereinafter. A true copy of said policy is attached to plaintiff's complaint and by reference made a part hereof. By the terms of said policy of insurance, the counterclaimant agreed to pay the said Edgar William Stokes a certain monthly indemnity in the event of the happening of certain contingencies. The risks insured against as provided in said policy are as follows:

"D. Loss of Business Time.

If the Insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time without indemnity therefor becoming due under the provisions of either of paragraphs A, B or C of this Part, and if further such total loss of all business time continues as such without change for more than—Three Months—(hereinafter called the excepted period) the Company will pay indemnity for the loss of business time occurring thereafter as follows:

1. Total Loss of Time. Said Monthly Indemnity will be paid for the period of such total loss of time which immediately succeeds the expiration of the said excepted period, and also will be paid for any subsequent period or periods of such total loss of time if the Insured is entitled to indemnity for partial loss of time, as hereinafter provided, during the entire interval between the periods of total loss of time.

2. Partial Loss of Time. One half of said Monthly Indemnity will be paid for any period or periods during which the Insured is unable to perform work substantially essential to the duty or duties of his occupation provided that in each instance the period of such partial disability immediately succeeds a period of total loss of time for which indemnity is payable under the preceding provisions of this paragraph D, and further provided that indemnity for such period or periods of partial disability will not be paid for more than a total of six months during any continuous disability.

E. Hospital Indemnity.

If the Insured by reason of bodily injury or sickness shall be under treatment and also be resident in a licensed hospital, the Company will pay, in addition to whatever other indemnity may be payable under this policy, twenty-five percent of said Monthly Indemnity for the continuous period of such residence and treatment, commencing at the first day thereof and not exceeding three months, during which he is disabled from performing all the duties of his occupation, but such indemnity will not be paid for more than one period as the result of any one accident or disease nor for more than one period during any continuous disability."

4. While said policy of insurance was in effect, and on or about the 26th day of February, 1952, the said Edgar W. Stokes filed a proof of claim on said policy above described, claiming and contending that he had been in an automobile accident resulting in the total loss of all his business time. The counterclaimant accepted such proof of claim as being true,

and on January 14, 1953 the counterclaimant paid to the said Edgar W. Stokes the sum of $6.25 covering a period of hospitalization from February 29, to March 5, 1952; and the sum of $525.00 covering a period of disability from the date of said accident to and including September 10, 1952, less a three month excepted, or waiting period, as prescribed in said policy.

5. Thereafter the said Edgar W. Stokes made further demands upon the counterclaimant for the payment of said monthly indemnity, contending that he was still permanently disabled from and after September 10, 1952, resulting in a total loss of "all business time". Upon further investigation of said claim, the counterclaimant discovered the following facts and therefore avers that:

(a) Prior to the time of said automobile accident the said Stokes completely discontinued his practice as a physician and retired from said practice, and sold a hospital in Louisville, Kentucky which he previously owned and operated, and thereupon completely disassociated himself from the operation of said hospital, either directly or indirectly. At the time of the alleged automobile accident of February 26, 1952, the said Edgar W. Stokes was not gainfully employed or engaged in any type of business, occupation or profession, nor was he devoting any time to a business or profession so that any claimed disability resulting from said automobile accident did not cause the said Stokes to "suffer a total loss of all business time" so as to entitle him to the monthly indemnity as provided by the terms of said policy.

(b) The said Edgar W. Stokes was not injured or disabled by the said automobile accident of February

26, 1952 so as to render him incapable or unfit to carry on his former business or occupation, nor was the claimed disability severe enough to render him incapable or unfit to devote all of his time to his former business or occupation had he chosen to do so.

6. The counterclaimant is informed and believes, and therefore alleges upon information and belief that it is the intention of the said Edgar W. Stokes to file separate suits to enforce the provisions of said policy at periodic intervals, claiming such amounts as may have accrued during the interval between these actions. The counterclaimant is informed, and therefore avers that it is the intention of the said Stokes to bring said suits at intervals of every three or four months so as to harass and embarrass the counterclaimant with a multiplicity of actions to enforce payment of said claim.

7. The counterclaimant avers that the intention of said Stokes to harass the counterclaimant with a multiplicity of suits is manifested by the filing of suit in the Civil Court of Record in and for Dade County, Florida, same being case No. 61360, for monthly indemnity for the months commencing May 10, 1954, June 10, 1954 and July 10, 1954, or a total of $450.00—notwithstanding the fact that at the time of the filing of said suit the instant case was already pending in this Honorable Court, and jurisdiction of the parties and the subject matter had then been obtained by this Honorable Court with full authority to do complete justice and to entertain further jurisdiction of any additional claims that the plaintiff Stokes might now have, or hereafter have, on account of the

said policy. A true and correct copy of the complaint filed in said case No. 61360 is attached hereto and by reference made a part hereof. The allegations made in said suit and the contentions asserted are precisely the same as those in the suit now pending before this Court, except for the number of monthly installments claimed to be due.

8. By reason of the premises the counterclaimant is threatened with the filing of a new and separate action every three or four months in different Courts, whereas it appears that recovery by the plaintiff would necessarily be predicated upon the finding of a single fact, that is whether or not the insured has been disabled by bodily injury so as to "suffer a total loss of all business time", and that to permit the said Stokes to proceed with each separate action involving precisely the same subject matter would subject the counterclaimant to unusual and unnecessary costs, expenses and attorneys fees, and would permit a multiplicity of suits and circuity of action. All of the controversies existing between the counterclaimant and the said Stokes can be determined in one proceeding in this Honorable Court and thereby prevent a multiplicity of suits, circuity of action, unusual and unnecessary costs and expenses and the harassment of the counterclaimant attendant upon such multiplicity of suits or actions.

9. The counterclaimant does not repudiate or deny the existence of the contract of insurance herein sued upon, but is now and has always been ready and willing to abide by and comply with the terms and conditions of said contract.

10. There is an actual controversy between the counterclaimant and the said Edgar W. Stokes under the contract hereinabove referred to, entitling the plaintiff by virtue of the existence of such actual controversy to have declared the present existing rights and other legal relations between them. More particularly, the controversy between the parties is that under said policy of insurance the said Stokes contends that he is totally and permanently disabled so as to cause him to "suffer a total loss of all business time" and that he is therefore entitled to payment of the monthly indemnity as provided in said policy of insurance; while on the other hand the counterclaimant contends that the said Stokes was not engaged in any business or occupation or devoting any time to any business or occupation at the time of the alleged accident, and therefore did not "suffer a loss of all business time", and further contends that the said Stokes is not disabled to such an extent as to "suffer a loss of all business time", and is therefore not entitled to the monthly indemnity as provided in said contract. The uncertainty arising under and by virtue of the contractual relationship and facts herein set out between the parties can only be stabilized and set at rest by the rendition of a declaratory judgment herein.

Wherefore, the counterclaimant prays that a declaratory judgment be made and entered herein fixing, determining and declaring the rights, liabilities, duties, responsibilities, and legal relations of the parties hereto; that the reciprocal rights and liabilities of the parties be declared and determined fully in accordance with said policy of insurance and the law in such cases made and provided; that the said Ed-

gar W. Stokes, his agents and attorneys, and all others acting in aid or assistance of him, be restrained and enjoined from filing and prosecuting any action in any other Court, except this Court, upon the said policy of insurance, or with respect to any rights claimed thereunder, and more particularly that the said Edgar W. Stokes be enjoined from further prosecuting case No. 61360 hereinabove referred to and now pending in the Civil Court of Record of Dade County, Florida, and for such other further and general relief as to this Court may seem right and proper.

The counterclaimant further prays that pending a final determination of this cause on its merits, a temporary injunction be entered herein enjoining and restraining the said Edgar W. Stokes, his agents, attorneys, and all others acting in aid or assistance of him, from further prosecuting said case No. 61360 in the Civil Court of Record upon such terms and conditions as to this Court may seem right and proper.

DEMAND FOR JURY TRIAL.

The defendant hereby demands a jury trial of all of the issues in this cause.

KNIGHT, SMITH & UNDERWOOD,
As Attorneys for Defendant,
By JACKSON T. PETERS.
804 Ingraham Building,
Miami 32, Florida.

I Hereby Certify that a true copy of the foregoing Answer, Counterclaim and Demand for Jury Trial

was on this 20th day of August, 1954, mailed to Sams & Goldman, DuPont Building, Miami, Florida, attorneys for plaintiff.

JACKSON T. PETERS,
Of Counsel.

COMPLAINT

In the Civil Court of Record, in and for Dade County, Florida.

Edgar W. Stokes, Plaintiff,

vs. No. 61360.

Continental Assurance Company, an Illinois corporation, doing business in Dade County, Florida, Defendant.

The plaintiff, Edgar W. Stokes, sues the defendant, Continental Assurance Company, an Illinois corporation, authorized to do business in Florida and doing business in Dade County, Florida, and alleges:

1. Plaintiff's cause of action hereinafter set forth involves a claim in excess of Five Hundred Dollars ($500.00), but does not exceed, exclusive of interest and costs, the sum of Five Thousand Dollars ($5,000.00).

2. That heretofore and on or about the 15th day of June 1927, in consideration of the payment by the

plaintiff to the defendant of the annual premium of $54.15 the defendant made and delivered to the plaintiff its policy signed and executed by its duly authorized officers and did therein and thereby promise and agree that in the event the plaintiff sustained bodily injury caused by accidental means, or from sickness, resulting in his total disability from continuing his occupation and profession as a physician, to pay to the plaintiff a monthly indemnity of One Hundred Fifty Dollars ($150.00) per month during the period of such disability, all of which more particularly appears from a photostatic copy of said policy hereto attached and made a part hereof.

3. That thereafter from time to time said policy of insurance was renewed and extended by the payment of the annual premium of $54.15 and in particular was renewed for the period of one year from the 15th day of June, 1951 by the payment of such premium and at the time of the sustaining of the accident by plaintiff as hereinafter alleged was in full force and effect.

4. That on or about the 26th day of February, 1952, the plaintiff received bodily injury solely through accidental means in that plaintiff was seriously and permanently injured in an automobile accident which said injuries did totally disable plaintiff from continuing his said occupation from the time of said accident to the present; and at the present time the plaintiff continues to be totally disabled from continuing his said occupation.

5. That plaintiff has duly performed all of the conditions of such policy of insurance on his part; and

plaintiff has been duly compensated by the defendant under the terms of said policy through and including September 10, 1952.

6. That since September 10, 1952 the defendant has refused to make any and all further payments under said policy, although payment thereof has been duly demanded; and although, at the request of the defendant, the plaintiff has submitted himself to be examined repeatedly by physicians representing the defendant.

7. That the defendant's failure to pay the monthly payments commencing with Spetember 10, 1952 through and including the month commencing April 10, 1954 is a subject of a separate action at law.

8. That as a result of the foregoing there is now due and owing to the plaintiff from the defendant upon said policy of insurance the sum of One Hundred Fifty Dollars ($150.00) for the months commencing May 10, 1954, June 10, 1954, and July 10, 1954, or a total now due and owing of Four Hundred Fifty Dollars ($450.00) plus interest.

9. That the plaintiff has been required to employ counsel to prosecute this action and, therefore, as authorized and provided in Section 625.08. Florida Statutes, demands a reasonable sum as fees or compensation for his attorneys in the amount of Seventy Five Dollars ($75.00).

10. That this action was not commenced within sixty days after giving to the defendant due proof of the disability of plaintiff, aforesaid, and has not been begun within one year after the happening of the accident hereinabove alleged.

Wherefore, the plaintiff demands judgment against the defendant in the amount of Five Hundred Twenty Five Dollars ($525.00) and for the costs of this litigation as same be ultimately determined at the conclusion of this cause.

SAMS & GOLDMAN,
Attorneys for Plaintiff,
By PHILIP GOLDMAN,
Of Counsel.

1335 duPont Building,
Miami, Florida.

On January 10, 1955 ANSWER TO COUNTERCLAIM was filed in the words and figures as follows:

(Title Omitted.)

The Plaintiff, Edgar W. Stokes, by his undersigned attorneys, for answer to the counter-claim, says:

1. He admits the allegations of Paragraph 1 of the counter-claim.

2. He admits the allegations of Paragraph 2 of the counter-claim.

3. He admits the allegations of Paragraph 3 of the counter-claim except that he asserts that the policy of insurance, No. D 30918, attached to the complaint and admitted to be a true copy thereof constitutes the best and most accurate recitation of the risks insured against in said policy.

4. He admits the allegations of Paragraph 4 of the counter-claim.

5. He admits the allegations contained in the first complete sentence of Paragraph 5 of the counter-claim. He denies each and every other allegation of Paragraph 5 of the counter-claim including those allegations set forth in sub-paragraphs (a) and (b) of Paragraph 5.

6. He denies the allegations of Paragraph 6 of the counter-claim.

7. Except for the allegation as to the intent of the plaintiff to harass the counter-claimant with a multiplicity of suits, which allegation is denied, he admits the allegations of Paragraph 7 of the counter-claim.

8. He denies the allegations of Paragraph 8 of the counter-claim and affirmatively states that all such allegations are argumentative.

9. He denies the allegations of Paragraph 9 of the counter-claim except that he admits that the counter-claimant has not denied the existence of the contract of insurance sued upon.

10. Answering Paragraph 10 of the counter-claim, he admits the allegations of fact contained therein but denies each and every argumentative and conclusory allegation set forth therein.

MURRAY SAMS, JR., and
PHILLIP GOLDMAN,
Attorneys for Plaintiff,
By PHILLIP GOLDMAN,
Of Counsel.

I hereby certify that a copy for the foregoing Answer was mailed to Knight, Smith & Underwood, Attorneys for Defendant, Ingraham Building, Miami, Florida, this 10th day of January, 1955.

PHILLIP GOLDMAN.

On December 8, 1955 TRANSCRIPT ON PRE-TRIAL CONFERENCE was filed in the words and figures as follows:

(Title Omitted.)

Appearances:

Murray Sams Esq., appearing on behalf of the Plaintiff.

Wesley S. Carey Esq., appearing on behalf of the Defendant.

Edgar W. Stokes, Plaintiff,

vs. No. 5807-M. Civil.

The Continental Casualty Company, Defendant.

Appearances:

Thomas H. Anderson Esq., appearing on behalf of the Plaintiff.

Wesley S. Carey Esq., appearing on behalf of the Defendant.

Miami, Florida.
December 1, 1955.

The above entitled causes came on for hearing before the Hon. Emett C. Choate, United States District Judge, pursuant to Orders for pre-trial conferences.

Mr. Carey:

If it please the Court, we have a motion before Your Honor for consolidation of these two suits for trial, and counsel for the defendant stated at the time that I would stipulate that the only issue was as to the disability of the Plaintiff, and that the matters could be tried together. I am prepared to stipulate as to the issue to be submitted to the jury.

The Court:

This man was disabled and you paid for a number of years.

Mr. Carey:

For some months, and then it was discontinued. Bearing in mind also that the man's condition might change at any time, from one time to another. In other words, this is a suit for declaratory judgment with respect to the rights of the parties as they existed at the time. I am prepared to stipulate that the following be the issues submitted to the jury if both matters are tried together.

(1) Did the Plaintiff on or after February 26, 1952, become totally disabled by bodily injury, or by sickness so as to suffer a total loss of all of his business time? If your answer to the above question is "No", you will disregard the following questions. If your answer to the above question (1) is "Yes", you will answer the following questions:

(2) When did such disability, if any, begin?

(3) Has such disability, if any, discontinued? If your answer to question (3) is "No," you will not

answer question (4). If your answer to question (3) is "Yes", you will answer question No. 4.

(4) When did such disability, if any, discontinue?

(Discussion off the record.)

The Court:
Is it agreed the Policy is in force?

Mr. Sams:
I don't know that it is.

The Court:
Mr. Carey agrees that the Policy was in force, and that after the issuance of the Policy, disability did occur.

Mr. Carey:
That's correct, sir.

The Court:
The cases will be consolidated because there is only one issue to try.

Mr. Anderson:
I didn't understand that that was Mr. Sams' suggestion to the Court the other day. I don't want to put any additional burden on the Court. I am not familiar with the state of the pleadings in Mr. Sams' case.

(Discussion off the record.)

Mr. Carey:
We demand a jury trial in both cases.

Mr. Anderson:
Mine is a suit for declaratory decree, and it isn't a jury case.

Mr. Carey:
Are you willing to let the matter be tried by the Court?

Mr. Sams:
I want a jury trial in my case.

Mr. Carey:
The case being reduced to the sole issue to be determined by the jury, the sole remaining function then would be the amount, if any due, and that would be declared in the Court's judgment.

The Court:
I cannot force these suits to be consolidated.

Mr. Anderson:
I would like to think that over.

The Court:
We will try the jury case first in any event.

Mr. Anderson:
It may be that my client will agree to let it go along with the other one.

(Discussion off the record.)

Mr. Carey:

Do I understand that counsel is willing to consider that the jury matter is withdrawn in his case? That would be the only reason for not consolidating them at this time.

Mr. Anderson:

I have told the Judge that I would talk to my client.

Mr. Carey:

My motion for consolidation of the cases was deferred until today, and that's the only reason the pretrial was set up, as I understand it. For the sole reason to give us an opportunity to determine whether we would be willing to try the matter of disability as the sole issue.

The Court:

I think both attorneys are agreeable to that, are you not?

Mr. Anderson:

I think that's the only question.

Mr. Carey:

I am not prepared to stipulate to try it as to one sole issue unless you gentlemen are willing to abide by your stipulation.

The Court:

It was covered at the last hearing that if he would agree to make only the disability the issue, that the cases would be consolidated. I don't believe Mr. Anderson told me positively that he would do so. There were indications on both sides that he would.

Mr. Sams:
I still have no objection to that.

Mr. Anderson:
I will take it up with my client.

The Court:
It is also clearly understood that if they are not consolidated, Mr. Sams' case will be tried first as a jury case, and then immediately thereafter I will try the next jury case.

Mr. Carey:
Your Honor understands that there are a great number of Doctors involved in this case, and they would all have to be brought in twice.

The Court:
That is something I cannot help.

(Discussion off the record.)

Mr. Carey:
There is no stipulation then?

The Court:
No. It will remain open for five or six days so as to give Mr. Anderson a chance to get his client's consent.

Mr. Carey:
And if the stipulation is not entered into we reserve all defenses under the Policy.

The Court:

Let's start on the pretrial, the first case. We will consider first the simplification of the issues. Stokes versus the Continental Assurance Company. What is the amount of the claim?

Mr. Sams:

The amount of the claim at the time of this Complaint was $4,000.00. At the time Judge Holland granted the Injunction, it was understood, and stipulated between ourselves, and with Mr. Bob Underwood, who was then representing the defendant, that prior to trial we would be able to amend our Complaint to bring it up to date as to the amount we claimed would be owed at this time. Each month there is a new accrual.

The Court:

Is that stipulation still in effect?

Mr. Carey:

I would have no objection to their amending the Complaint.

The Court:

There being no objection it will be amended to bring it up to whatever the amount would be at the time of trial. You will know the date of trial, approximately, and you will submit figures to counsel on the other side. Is it agreed that the premiums were paid?

Mr. Carey:

We have made no issue as to the payment of premiums up to the time of the alleged disability.

The Court:

Up to the time of the alleged disability, the premiums were paid. Is it agreed that they were not paid since that time?

Mr. Sams:

I don't believe any premiums have been paid since that time.

The Court:

Let it so appear.

Mr. Anderson:

I don't think the premiums have been paid.

The Court:

Mr. Anderson, you are going to amend to bring yours up to date?

Mr. Anderson:

I don't think I have to, Judge, because this is a suit for declaratory decree.

The Court:

All right.

Mr. Anderson:

You can take care of that in the Decree.

The Court:

Yes. The premiums in your case were paid up to the time of the alleged disability, and have not been paid since.

Mr. Anderson:

That's my understanding.

The Court:
The date of the alleged disability is February 26, 1952, in both cases. Is that correct?

Mr. Anderson:
That's correct.

The Court:
And you both contend that the disability has continued to the present date?

Mr. Anderson:
That's right.

Mr. Sams:
Yes, sir.

The Court:
On the part of the defendant, do you agree that the plaintiff was involved in an accident on February 26, 1952?

Mr. Carey:
No, sir, I don't think we would wish to stipulate to that.

The Court:
Unless this other stipulation is entered into.

The Court:
If the other stipulation is entered into then there would be one issue as to disability.

Mr. Carey:
Yes.

The Court:
You wouldn't have to prove how he got the disability?

Mr. Carey:
No. You wouldn't have to prove there was a specific accident.

The Court:
But he just was disabled at the time?

Mr. Carey:
Yes.

Mr. Sams:
We would also like to amend and bring in additional sickness that may or may not be related to the accident.

(Discussion off the record.)

Mr. Sams:
We contend that he suffered a heart condition. He was already disabled, and I think the testimony will clearly show. At the present time he has the additional problem of a heart condition which makes him more disabled.

The Court:
What words would you like inserted in this Complaint?

Mr. Sams:
4. I think we can put in there, "Or in the alternative that while suffering from total disability as a

result of accidental means, the plaintiff suffered a heart attack, which in addition to his previous injuries, renders him totally disabled and unable to continue his previous occupation."

The Court:
Would you add that to paragraph 4 then?

Mr. Sams:
Yes, sir.

The Court:
Would you file that amendment forthwith?

Mr. Sams:
Yes, sir.

Mr. Carey:
I'd like to show my objection to the filing of the amendment. Let the record show that we deny that that is the case. And if it is allowed, Judge, may our Answer as now filed stand as a denial of that allegation?

The Court:
Yes, it may. Any added additions in the way of amendment in reference to disability will be considered as being denied. Not only will your answer stand, but in addition to that there will be a specific denial.

Mr. Anderson:
In my case the same situation exists. I take it I have the same permission?

The Court:

Yes, and the same result will follow in both cases. Is it admitted that up to the 26th February, 1952 that he performed the conditions of the Policy?

Mr. Anderson:

Judge, it is not my place to answer that question, but I would like to call this to the Court's attention. The plaintiff was injured in February 26, 1952, and some time after that the defendant made some payments on account of the Policy, and then they stopped payment on September 10, 1952.

The Court:

What I am saying is that up to the date of the alleged injury he had paid these premiums. He had complied with the requirements of the Policy. Is that correct?

Mr. Carey:

We are willing to state that the Policy was in full force and effect as of February 26, 1952.

The Court:

And that you did pay him certain compensation up to and including September 10, 1952?

Mr. Carey:

That certain compensation was paid. I'd like to check the exact amount.

The Court:

You furnish the amount at the trial.

Mr. Carey:

Yes, sir.

The Court:

And since September 10, 1952, you have failed and refused to make any further payments?

Mr. Carey:

Yes, sir.

Mr. Sams:

May I ask a question in the light of Mr. Carey's answer?

The Court:

Yes.

Mr. Sams:

I'd like to know whether or not their contention is they stopped payments because of the non-performance of the provisions of the Contract, or whether it was because of denial of disability?

Mr. Carey:

We have a counterclaim which sets up the reasons for the contention that we are entitled to a refund, in which it is stated among other things that it is contended that he did not suffer a loss of all business time, and further that the plaintiff is not disabled to such an extent as to suffer a loss of all business time.

The Court:

And for that reason you stopped payments, and it is for that reason that you claim in the counterclaim that the payments you did make should be refunded to the Company. Is that correct?

Mr. Carey:
That's right.

The Court:
In both cases?

Mr. Anderson:
I don't have this counterclaim in my case. My file doesn't disclose it.

Mr. Carey:
In his case it is a matter for declaratory judgment, so there is a different situation present.

The Court:
The reasons for not continuing payment were the reasons given by counsel?

Mr. Carey:
Yes, sir, and as stated more specifically in the counterclaim.

The Court:
What became of the other action?

Mr. Carey:
They have been enjoined from proceeding with that action.

The Court:
Is it agreed that the whole matter should be determined in this action?

Mr. Carey:
It may be agreed as far as I am concerned so long as the plaintiff would agree to go in and dismiss

that action so that it may be considered as dismissed and closed.

Mr. Sams:
It would have to be.

The Court:
Let's travel on that ground.

(Discussion off the record.)

Mr. Sams:
I don't have any objection to dismissing the suit that is over there.

Mr. Carey:
I understand you have no objection to dismissing it before this matter goes to trial?

Mr. Sams:
Yes.

The Court:
Dismiss it without prejudice

Mr. Carey:
All right, sir.

Mr. Sams:
Yes, sir.

The Court:
The amount that will be claimed will differ from paragraph 8 in your Complaint. It will be brought down to date.

Mr. Sams:
Yes, sir.

The Court:
The full disability is $150.00 a month. Is that correct?

Mr. Carey:
Yes, sir.

The Court:
It is evident they have employed an attorney so I think there is no contention about that.

Mr. Carey:
There would be a very strong contention about that, —not that they have employed an attorney, but that they are entitled to fees.

(Discussion off the record.)

The Court:
Is it agreed that this action was not processed within 60 days after the proof of disability had been filed, and was not begun within one year after the happening of the accident?

Mr. Carey:
I don't believe we make any contention as to that.

The Court:
Is it agreed that the Policies attached to the Complaint are the Policies in question?

Mr. Carey:
Yes, sir.

The Court:
And that copies may be admitted, or photostats thereof in lieu of the originals.

Mr. Carey:
Agreeable.

Mr. Sams:
Agreeable.

The Court:
I think we have covered the factual contentions of the parties as we have gone along. Are there any undisposed motions of any type or kind in either one of these cases?

Mr. Anderson:
I don't know of any.

Mr. Carey:
The motion to consolidate.

The Court:
Yes, which is dependent upon certain matters that we have discussed. Documentary evidence. What documentary evidence other than the Policies do you have?

Mr. Sams:
Hospital records of the Hospitalization which I believe you have copies of, along with the electrocardiograms, which you have copies of.

Mr. Carey:
Which Hospital records?

Mr. Sams:
Broward General Hospital.

The Court:
Is it agreed in both cases that photostat copies of these records may be admitted in evidence without objection?

Mr. Carey:
Wasn't there another Hospital at Clewiston?

Mr. Anderson:
I don't think there is any record of that. He was over there overnight, as I remember the facts, and he went from Clewiston into Fort Lauderdale, where he entered the Broward General Hospital.

Mr. Sams:
I have no records from there, and as far as I know, there weren't any, and I don't intend to offer any.

Mr. Carey:
I have no objection providing the stipulation in that respect includes our right to introduce any other Hospital records which we can find.

The Court:
Yes, any Hospital records of Hospitals which have attended this man.

Mr. Sams:
In other words, the stipulation goes to the authenticity of the records.

The Court:
Yes. Photostats or certified copies may be admitted on either side without objection. Is that right?

Mr. Sams:
Yes, sir.

The Court:
So long as they are relative, of course, and pertinent to the issues.

Mr. Sams:
Yes.

The Court:
Is that agreeable to you, Mr. Anderson?

Mr. Anderson:
Yes, sir.

The Court:
Is that agreeable to you?

Mr. Carey:
Do I understand you are making a stipulation as to the authenticity, or are you stipulating they may be admitted without objection?

Mr. Sams:
No. Once they are offered, then of course if there is any objection to relevancy or materiality, that is something for the Judge to rule on. We cannot get a ruling on that now.

Mr. Carey:
Reserving objection only as to relevancy and materiality. Is that right?

The Court:

Let me make it clear. Hospital records concerning the plaintiff may be photostats or certified copies, certified by the custodian of the Hospital, and they may be admitted without question as to their authenticity, and reserving only the right to object to their materiality or relevancy.

Mr. Carey:

I think in some cases the Hospital records may be objected to as hearsay.

Mr. Anderson:

I think the parties ought to have the right to object to the pertinency.

The Court:

All right. They will be admitted if otherwise admissibly with the same effect as if the custodian were present to offer the original records. That will cover it. Any other records or reports or pictures or films? That goes also for the cardiograms. Is that correct?

Mr. Carey:

Yes, sir.

Mr. Anderson:

Yes.

The Court:

Are there any pictures or films or documents that either one of you have?

Mr. Sams:

I cannot think of any, Judge.

Mr. Carey:
I don't think of any at this time. I'd like to reserve the right, and they would too, if we think of anything further, we will advise each other.

The Court:
If you think of anything else along that line that is considered to be offered by either party, you will advise the other party and furnish copies not later than five days prior to trial.

Mr. Sams:
That's fine.

Mr. Carey:
Yes, sir.

The Court:
What Tables are to be used? The American Mortality Tables?

Mr. Carey:
No, sir. There won't be any Tables.

Mr. Anderson:
It is a fixed rate.

Mr. Sams:
His future disability won't have a bearing on this.

The Court:
The extent of the injury, of course, is disputed, because of the character of these cases. Has physical examination been made?

Mr. Carey:
That has been arranged for to be made the latter part of this month and counsel for the Plaintiff has been advised.

The Court:
I suppose no part of the medical testimony can be agreed upon. Is that right?

Mr. Carey:
I doubt it. I think we should agree that the Depositions that have been taken by out of town Doctors be read without the necessity of proof that the Doctors are still out of town at the time of trial. That is to say, some Depositions were taken in Louisville of Doctors who are resident there.

The Court:
Can that be agreed upon?

Mr. Sams:
As far as I am concerned, if they are out of town it is all right with me. I won't require him to bring proof they are out of town.

Mr. Anderson:
That's right.

The Court:
All right. Depositions may be read without proof that the parties are not within the required distance of this Court. Have the parties exchanged the names of their witnesses?

Mr. Carey:
Not as yet, sir.

Mr. Sams:
We will have to do that.

The Court:
Do that within ten days.

Mr. Anderson:
Does the Court intend to fix the number of experts in this case?

The Court:
I generally limit it to a reasonable amount.

Mr. Sams:
In this particular case there have been some Doctors who examined the plaintiff for the Insurance Company under the terms of the Policy. He was required to submit to an examination, but I haven't had an opportunity to discuss with him what the situation is. I will have to take their Depositions, I imagine. Dr. Keedy of Miami would testify, and I think Dr. Donberger who treated him for one condition in Fort Lauderdale. The Doctors' depositions have been taken in Kentucky, and I presume those will be received in evidence. The defendant took them, and if he wants to read them in, I don't object. Dr. Frederick L. Drew examined him for the Insurance Company. I don't know whether I will call him, or not.

The Court:
How about you, Mr. Anderson?

Mr. Anderson:
Judge, I took the depositions of a couple of Doctors in Fort Lauderdale, one was Dr. Taylor. I forget the

other Doctor. Maybe he was not my witness. I am not certain. I am a little bit at a disadvantage. One Doctor went away after his deposition was taken, and he hasn't been back to Miami since. He is in Kentucky.

The Court:
How many defense Doctors are there?

Mr. Carey:
I wonder, Judge, if we might be given until ten days prior to trial date to give the names?

The Court:
How many depositions have been taken?

Mr. Carey:
Three or four in Louisville which we should like to use. Of course we would like to have the liberty of calling any of the Doctors who have attended the plaintiff at his own expenses up in Fort Lauderdale.

The Court:
I think both of you will have those, won't you?

Mr. Sams:
Yes, sir.

Mr. Carey:
If they don't, we would like to have the liberty of doing so.

The Court:
All right. Have those who attended him in Fort Lauderdale.

Mr. Carey:

The Court appointed physicians, and I would like to have leave to have one other expert witness on each phase of his alleged illness on the psychiatry and neurological questions. He claims that he had a post concussion syndrome from the accident, and claims he had a heart condition, and he claims he has a psychiatric condition, as I understand it.

The Court:

Is that right?

Mr. Sams:

Yes, he does.

The Court:

Exchange the names of your Doctors not later than ten days prior to trial, and furnish the Court with copies. I don't want too many Doctors. Perhaps three Doctors to a side ought to be enough.

Mr. Sams:

The only problem we have there,—we are bearing the burden. We would like to make a demand upon Mr. Carey, if it is in order, that he exchange copies of medical reports. We would like to see copies of the reports of these Doctors from the Insurance Companies under the terms of the Policy, and we will submit to him any copies of reports we have from our Doctors, or at least, I will I cannot speak for Mr. Anderson.

Mr. Anderson:

I will go along with that.

Mr. Sams:

That will go a long way to arrange how many Doctors we will call, and alleviate the necessity of taking depositions, and so forth.

Mr. Carey:

I don't see the necessity of that. These gentlemen have control of the case, and they have had the chance to take the Plaintiff to any Doctors that they wish. We will give them copies of the Court appointed physicians.

Mr. Anderson:

I think we ought to be entitled to the reports which the Company physicians have sent to the Companies.

Mr. Carey:

I am willing to give them reports of any Doctors that we use. I don't think they are entitled to delve into our file.

Mr. Sams:

It means we will have to take their depositions, if Your Honor please.

Mr. Anderson:

I don't see why it should require depositions.

(Discussion off the record.)

The Court:

I am always reluctant to require any reports made by employees or agents of any party for very good reaso . I am not going to force that. I share the views of Mr. Anderson that normally exchange would

probably be warranted unless there was some particular reason, or something of that sort, which I cannot see, and I don't know. I would suggest that you ought to give it considerable thought, Mr. Carey, and if you can do it, conscientiously do it. If you cannot, I will not order you.

Mr. Sams:

I am not contending I would be entitled to it as a matter of law, and I am not making any request. I thought it would save time.

The Court:

It would save time. That is the only merit.

Mr. Sams:

I intend to take the depositions of the Doctors, and in light of that situation I would like Mr. Carey to submit to me a list of the names and addresses of those Doctors who have examined the plaintiff for the Insurance Company, prior to ten days before trial.

Mr. Carey:

I am willing to do that.

The Court:

All right. Do that. Any other questions aside from Mr. Carey's novel question about attorney's fees?

Mr. Anderson:

I don't think so, Judge.

The Court:

At least 48 hours before trial give me your proposed instructions. That doesn't limit you if some-

thing comes up during the trial. I will give the usual instructions from the red book.

Mr. Carey:

Do I understand that so far as the proposed stipulation to reduce the issue to the disability question as outlined by me, that if I do not hear from counsel for the plaintiff in both cases within five or six days, it is understood?

The Court:

We will say a week from today.

Mr. Anderson:

I will communicate with Mr. Carey and the Court.

(Thereupon the pre-trial conference was concluded.)

On December 15, 1955 MOTION TO CORRECT TRANSCRIPT OF PRE-TRIAL CONFERENCE filed in the words and figures as follows:

(Caption Omitted.)

The defendants by their undersigned attorneys move to correct the record of the pre-trial conference held before the Honorable Emett C. Choate, December 1, 1955, and point out that on page three the following appears:

"The Court:

Mr. Carey agrees that the Policy was in force, and that after the issuance of the policy, disability did occur.

Mr. Carey:
That's correct, sir."

The defendants submit that the question and answer there transcribed are incorrect, and that the question propounded by the Court was in substance that Mr. Carey agreed that the policy was in force and that the date of alleged disability occurred after the issuance of the policy. It is submitted that this correction is obviously in order in view of the fact that this question and answer immediately follows the statement by Mr. Carey in which he offered to stipulate as to the issues which are to be submitted to the Jury, the first of such issues as outlined as beginning on page two of the transcript of the pre-trial hearing, being whether the plaintiff did on or after February 26, 1952, become totally disabled.

This position is further borne out by the discussion as to "alleged" disability on page eight and nine, the Court ruling that as to any amendment to the complaint the defendants' answer would stand as a denial with reference to disability as appears on page ten, and the discussions for the reasons of the counterclaim at pages eleven and twelve, wherein it is made clear that it is alleged that no disability has taken place and for that as well as for other reasons the company counterclaims for the return of the payments which were made for a short period of time.

Defendants further move to make a correction at page twenty-four to add the words at the end of the first paragraph:

"That there is no such stipulation?"

so that the entire sentence beginning at the bottom of page twenty-three will read as follows:

"Mr. Carey, Do I understand that so far as the proposed stipulation to reduce the issue to the disability question as outlined by me, that if I do not hear from counsel for the plaintiff in both cases within five or six days, it is understood that there is no such stipulation?"

It is apparent that the sentence as reported is incomplete.

CONTINENTAL ASSURANCE COMPANY,
An Illinois corporation, and
THE CONTINENTAL CASUALTY COMPANY,
Defendants,
By CAREY & PAPY,
By (S.) WESLEY G. CAREY,
Of Counsel.

CAREY & PAPY,
Attorneys,
548 Seybold Building,
Miami 32, Florida.

I Do Certify that copy hereof was this 13th day of December, 1955 mailed to Sams & Anderson, Attorneys for Plaintiff, 1218 duPont Building, Miami 32, Florida; and Anderson & Nadeau, Attorneys for Plaintiff, 908 First National Bank Building, Miami, 32 Florida.

(S.) WESLEY G. CAREY,
Attorney.

On January 13, 1956 ORDER FOR PHYSICAL EXAMINATION OF PLAINTIFF was filed in the words and figures as follows:

(Caption Omitted.)

The above causes coming on to be heard on the Motion of Defendants to dismiss for failure of Plaintiff to appear before Dr. Richard E. Strain for examination pursuant to the order of the Court, and Plaintiff's counsel representing to the Court that this was by error, and that Plaintiff would appear at an early date in conformity with such order;

And the causes coming on further to be heard on Defendant's motion to appoint an alternate physician to examine the Plaintiff in view of Dr. Herbert Eichert's having disqualified himself from making such examination;

And the causes having come on further to be heard on Defendants' motion to correct the transcript of pre-trial conference, and the Court having heard arguments of counsel and being fully advised;

It Is Hereby Ordered:

A. The motion of defendants to dismiss is denied and Plaintiff is directed to appear for examination at the office of Dr. Richard E. Strain at an appointed time to be arranged by counsel.

B. It is further ordered that Defendant's motion for the appointment of an alternate physician to replace the appointment of Dr. Herbert Eichert is al-

lowed, and Dr. Scheffel H. Wright, DuPont Building, is hereby appointed to make an examination of Plaintiff, including electrocardiograms and such other tests and procedures as may be necessary, and Plaintiff is directed to appear at the office of Dr. Scheffel H. Wright at a time to be arranged by counsel.

C. It is further ordered that motion of Defendants for correction of the transcript of pre-trial conference is hereby allowed.

Done and Ordered this 10th day of January, 1956.

EMETT C. CHOATE,
Judge of the U. S. District Court.

On January 23, 1956 SUPPLEMENT TO COMPLAINT was filed in the words and figures as follows:

(Title Omitted.)

The plaintiff, Edgar W. Stokes, as permitted by Rule 15(d), Federal Rules of Civil Procedure, and as authorized by this Court, at the Pre-trial Conference in this cause, files this Supplement to his Complaint, as follows:

1. Since the filing of the original Complaint herein, and as a result of the matters alleged in paragraphs 1 through 6 of the original complaint, there is now due and owing to the plaintiff from the defendant, in addition to the amount alleged in paragraph 7 of the original Complaint, the fillowing:

(a) One Hundred Fifty Dollars for the months commencing May 10, 1954, June 10, 1954, July 10, 1954, August 10, 1954, September 10, 1954, October 10, 1954, November 10, 1954, December 10, 1954, January 10, 1955, February 10, 1955, March 10, 1955, April 10, 1955, May 10, 1955, June 10, 1955, July 10, 1955, August 10, 1955, September 10, 1955, October 10, 1955, November 10, 1955, December 10, 1955, January 10, 1956, or a total of Three Thousand One Hundred Fifty ($3,150.00) Dollars plus interest which when added to the monies due under the original Complaint, total Six Thousand One Hundred Fifty ($6,150.00) Dollars plus interest.

(b) That the demand for attorneys' fees set forth in the original Complaint be supplemented by a further demand for an additional Seven Hundred Fifty ($750.00) Dollars, making a total demand for reasonable attorneys' fees in the amount of One Thousand Five Hundred ($1,500.00) Dollars.

2. That the ad damnum clause of the original complaint be supplemented or amended to reflect this Supplement to Complaint.

SAMS & ANDERSON, and
PHILLIP GOLDMAN,
Attorneys for Plaintiff.
By MURRAY SAMS, JR.,
(Murray Sams, Jr.).

I hereby certify that a copy of the foregoing Supplement to Complaint was (mailed, delivered) to Carey & Papy, Attorneys for the defendant, 548 Seybold Building, Miami, Florida, this . . day of January, 1956.

MURRAY SAMS, JR.

On January 25, 1956 AMENDMENT TO COMPLAINT was filed in the words and figures as follows:

(Title Omitted.)

The plaintiff, Edgar W. Stokes, with permission of the Court amends his complaint to conform to his proof and alleges:

1. In addition to the matters and things alleged in the complaint and amendments thereto, that at all times during the period from December 10, 1952 to and including the present, he has suffered a total loss of business time as a result of mental disease or illness precipitated by, or aggravated by, the accident described in the original complaint, and as a result of mental disease or illness precipitated by, or aggravated by, a heart condition occurring on or about May, 1954.

MURRAY SAMS, JR. and
PHILLIP GOLDMAN,
Attorneys for Plaintiff,
By MURRAY SAMS, JR.

duPont Building,
Miami, Florida.

I hereby certify that a copy of the foregoing Amendment to Complaint was delivered to Carey & Papy, Seybold Building, Miami, Florida, this 25th day of January, 1956.

MURRAY SAMS, JR.

On January 26, 1956 FINAL JUDGMENT was filed in the words and figures as follows:

In the United States District Court in and for the Southern District of Florida. Miami Division.

Edgar W. Stokes, Plaintiff,
vs. No. 5607-M-Civil.
Continental Assurance Co., an Illinois corporation, Defendant.

This cause came on for trial on January 23, 24, 25 and 26, 1956, before the Honorable Emett C. Choate, one of the Judges of the above styled Court, and a jury of twelve true and lawful men and women, who having been first duly sworn according to law, and having heard the evidence, the arguments of counsel and the charges of the Court, and having retired to consider their verdict, returned into open Court the following verdict:

"Miami, Florida
January 25, 1956

We, the Jury find in favor of the Defendant. So say we all.

ROY P. FISHER,
Foreman".

It Is Ordered that judgment be and it is hereby rendered in favor of the Defendant, Continental Assurance Co., an Illinois corporation, and against the plaintiff, Edgar W. Stokes.

Plaintiff's take nothing by his suit, and defendant go hence without day, and may recover their costs in

this case incurred, said costs to be taxed by the Clerk of this Court.

Done and Ordered at Miami, Florida, this 26th day of January, 1956.

JULIAN A. BLAKE,
Clerk, U. S. District Court,
Southern District of Florida,
By ANNA M. FITZSIMMONS,
(Seal) Deputy Clerk.

On February 2, 1956 MOTION FOR NEW TRIAL was filed in the words and figures as follows:

(Title Omitted.)

The plaintiff, Edgar W. Stokes, by his undersigned attorneys, moves this Court to grant a new trial in the above styled cause on the following grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The Court erred in failing and refusing to give plaintiff's requested charge number one.

5. The Court erred in failing and refusing to give plaintiff's requested charge number two as set forth in plaintiff's written request.

6. The Court erred in failing to instruct the jury that the burden of proving that Edgar W. Stokes was able to perform some other occupation or perform some other type of work was on the defendant.

7. The Court erred in charging the jury as follows:

"The language of the policy dealing with disability does not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of any occupation or profession, or to perform any work whatever for compensation, gain or profit, but the disability contemplated means disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged, or in which he might have engaged within the contemplation of the particular insurance policy."

8. There was no evidence in the record that the plaintiff, Edgar W. Stokes, was not totally disabled.

9. There was no evidence in the record that the plaintiff, Edgar W. Stokes, was able to perform any other occupation or work.

SAMS & ANDERSON and
PHILLIP GOLDMAN.
Attorneys for Plaintiff.
By PHILLIP GOLDMAN.

1218 du Pont Building.
Miami 32, Florida.

I hereby certify that a copy of the foregoing Motion for New Trial was delivered to Carey & Papy, Seybold Building, Miami, Florida, this 2d day of February, 1956.

PHILLIP GOLDMAN.

On March 9, 1956 ORDER DENYING MOTION FOR NEW TRIAL, ASSESSING COSTS AND JUDGMENT FOR COSTS was filed in the words and figures as follows:

(Title Omitted.)

This cause coming on to be heard on the motion of Plaintiff for new trial, and the Court having heard arguments of counsel and being fully advised in the premises,

It Is Hereby Ordered that Plaintiff's Motion for New Trial is denied.

The cause coming on further on Defendant's Motion to Tax Costs, and Affidavit of Costs having been filed in this cause,

It Is Hereby Ordered that the costs of Defendant are taxed in the sum of $252.09, and Final Judgment is hereby entered in favor of the Defendant and against the Plaintiff for costs in the sum of $252.09. For Which Let Execution Issue Forthwith.

Done and Ordered this 9 day of March, 1956

EMETT C. CHOATE.

Judge of U. S. District Court.

On April 6, 1956 NOTICE OF APPEAL by Plaintiff was filed in the words and figures as follows:

In the United States District Court in and for the Southern District of Florida. Miami Division.

Edgar W. Stokes, Plaintiff,
vs. No. 5607-M-Civil.
Continental Assurance Company, an Illinois corporation, Defendant.

Notice Is Hereby Given that the plaintiff, Edgar W. Stokes, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered herein by the United States District Court for the Southern District of Florida, Miami Division, on January 26, 1956.

Dated at Miami, Florida, this 3rd day of April, 1956.

ANDERSON & NADEAU,
By HERBERT G. NADEAU,
Attorneys for Plaintiff.
908 First National Bank Building,
Miami 32, Florida.

I Hereby Certify that copy of the foregoing Notice of Appeal was mailed to Carey & Papy, Esqs., Attorneys for Defendant, Seybold Building, Miami, Florida, this 6th day of April, 1956.

HERBERT T. NADEAU.

On April 6, 1956 STATEMENT OF POINTS and DESIGNATION OF CONTENTS OF RECORD ON APPEAL was filed in the words and figures as follows:

(Title Omitted.)

Edgar W. Stokes, who has taken an appeal from the final judgment entered herein on January 26, 1956, states as the points to be relied upon on appeal for the reversal of said final judgment, the following severally:

1. The Jury erred in returning a verdict for the defendant.

2. The District Court erred in making and entering the final judgment dated January 26, 1956.

3. The District Court erred in making and entering its Order dated March 9, 1956, denying Appellant's motion for a new trial.

Designation of Contents of Record.

1. Recite the filing, and copy in full, the petition for removal, together with all exhibits except the summons and sheriff's return attached thereto, filed May 19, 1954.

2. Recite the filing, and copy in full, the motion to dismiss, filed May 19, 1954.

3. Recite the filing, and copy in full, the answer and counter-claim filed on August 20, 1954.

4. Recite the filing, and copy in full, the answer to counter-claim filed January 10, 1955.

5. Recite the filing, and copy in full, the minutes of the pre-trial conference, filed December 8, 1955.

6. Recite the filing, and copy in full, the supplement to complaint, filed January 23, 1956.

7. Recite the filing, and copy in full, the amendment to complaint, filed January 25, 1956.

8. Recite the filing, and copy in full, the final judgment, filed January 26, 1956.

9. Recite the filing, and copy in full, the motion for new trial, filed February 2, 1956.

10. Recite the filing, and copy in full, the order denying motion for a new trial, dated March 9, 1956.

11. Recite the filing and copy in full, the record of proceedings had in the trial of the cause.

12. Recite the filing, and copy in full, all exhibits which were offered in evidence.

13. Recite the filing, and copy in full, the Notice of Appeal, filed April ....., 1956.

14. Recite the filing, and copy in full, the statement of points and designation of contents of record on appeal, filed April ....., 1956.

ANDERSON & NADEAU,
By HERBERT T. NADEAU,
Attorneys for Appellant.

908 First National Bank Building,
Miami 32, Florida.

I Hereby Certify that copy of the foregoing Statement of Points and Designation of Contents of Record on Appeal was mailed to Carey & Papy, Esqs., Attorneys for Appellee, Seybold Building, Miami, Florida, this 6th day of April, 1956.

HERBERT T. NADEAU.

On April 16, 1956 DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD ON APPEAL was filed in the words and figures as follows:

(Caption Omitted.)

Continental Assurance Company, an Illinois corporation, by its undersigned attorneys, designates the following additional portions of the record to be included on appeal:

1. Recite the filing and copy in full, Motion to Correct Transcript of Pre-Trial Conference, filed December 15, 1955. Served on Opposing Counsel 12-13-55.

2. Recite the filing and copy in full, Order for Physical Examination of Plaintiff, which among other things contained:

"C. It is further ordered that motion of Defendants for correction of the transcript of pre-trial conference is hereby allowed." Order dated January 10, 1956 and filed January 13, 1956.

CONTINENTAL ASSURANCE COMPANY,
By CAREY & PAPY,
Attorneys for Defendant-Appellee,
By (S.) WESLEY G. CAREY,
Of Counsel.

CAREY & PAPY,
Attorneys,
548 Seybold Building,
Miami 32, Florida.

I Do Certify that copy hereof was this 16th day of April, 1956 mailed to Attorneys for Plaintiff-Appellant, Anderson & Nadeau, 908 First National Bank Building, Miami 32 Florida.

(S.) WESLEY G. CAREY,
Attorney.

On June 22, 1956 TRANSCRIPT OF TRIAL PROCEEDINGS was filed in the words and figures as follows:

In the District Court of the United States for the Southern District of Florida, Miami Division.

Edgar W. Stokes, Plaintiff,
vs. No. 5607-M. Civil.
Continental Assurance Company, an Illinois Corporation, Defendant.

January 24, 1956.

The above entitled cause came regularly on for trial before the Hon. Emett C. Choate, United States District Judge, and jury duly and regularly impaneled and sworn to try the same, in open Court, at Miami, Florida.

Appearances:
Murray Sams, Jr., Esq., and Philip Goldman, Esq., appearing on behalf of the Plaintiff.

Wesley G. Carey, Esq., appearing on behalf of the Defendant.

The Court:
You may proceed.

(Whereupon, after opening statements by Mr. Sams and Mr. Carey, the following proceedings were had.)

The Court:
Ladies and gentlemen of the jury: In order to expedite this case and save your time, counsel on both

sides have taken part in what is known as a pre-trial conference. In the course of that conference, they have made certain admissions.

Now, admissions when made by both sides constitute complete evidence on that particular issue so that no evidence is necessary.

As part of those admissions, I am going to call to your attention at this time, so that when there is no evidence on the matter you will understand that none is required, because the matters are admitted.

It is admitted that up to the time of the alleged disability, that is, when the accident took place, that the doctor had paid the premiums on this particular policy.

It is admitted that this policy was issued, and a copy of it will be put in evidence so you may view it in case you desire when you retire to consider your verdict.

It is admitted that the date of the claim or alleged disability was February 26, 1952, and that the policy on that particular moment was in full force and effect.

It is admitted that on a claim made after February 26, 1952, for the period of February 26, 1952, to September 10, 1952, the defendant company paid to the doctor $150 per month, and that since September 10, 1952, had failed and refused to make any further payments, claiming that the doctor is not and was not disabled as required under the provisions of the policy.

It is agreed that the action was commenced after the time had elapsed which was required to have elapsed prior to bringing this action, and it is agreed that the doctor did file what he claimed to be a proof of his disability as required by the policy before he could maintain and bring this action.

Those matters are stipulated and agreed and no evidence upon them will be required.

Proceed.

Mr. Sams:

Before we call the first witness, I wonder if we could have just a brief recess. We have a couple of matters, and I think it would save some time.

The Court:

How many minutes?

Mr. Sams:

Just a short recess.

(Whereupon, the jury withdrew from the Courtroom.)

The Court:

Proceed.

Mr. Sams:

One of the primary reasons I asked for the recess was to get in the record early, so there would be no necessity of putting on any proof, a stipulation that Mr. Carey and I entered into in which we agreed to submit to Your Honor the question of attorney's fees.

We are entitled to attorney's fees, but we felt to simplify the issues it would be simpler—

The Court:

Dictate it into the record. Furnish me with affidavits.

Mr. Sams:

Either that or bring someone in.

The Court:

That will not be necessary. Just ordinary affidavits will suffice citing cases that were comparable.

Mr. Sams:

It is hereby stipulated by and between counsel for the respective parties that the question of attorney's fees may be presented to the Judge without a jury. Shall we say at a later date?

Mr. Carey:

The only thing I would add to that is that naturally, that would be true only if the jury finds—

The Court:

Yes, if the jury finds for you.

It shall be submitted to the Court either with or without supporting affidavits. It is agreed between counsel that the Court may make such decision based upon the Court's experience, knowledge of the case, or upon that plus affidavits that counsel may and will furnish within three days after a verdict.

Does that suit you gentlemen?

Mr. Carey:

Yes, sir.

Mr. Sams:

Yes, sir, Judge.

(Whereupon, after argument off the record, the jury returned to the Courtroom.)

The Court:
Do you each waive the polling of the jury and consent they are present?

Mr. Sams:
Yes, sir.

Mr. Carey:
Yes, sir.

The Court:
The plaintiff will proceed.

Mr. Sams:
At this time, if Your Honor please, I believe it will be without objection, we would like to offer in evidence the hospital records; that is, the Broward County Hospital.

Mr. Carey:
I have no objection.

The Court:
They will be admitted.

(The hospital records referred to were received in evidence as Plaintiff's Exhibits #1 and #2, respectively.)

Mr. Sams:
We might have the Clerk mark a photostatic copy of the policy as Plaintiff's Exhibit #3.

Mr. Carey:
No objection.

The Court:
It will be admitted.

(The document referred to was received in evidence as Plaintiff's Exhibit #3.)

Mr. Sams:
I will call Dr. Dornberger.

Thereupon, GEORGE R. DORNBERGER, was called as a witness on behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Sams:
Q. State your name, please, sir.
A. George R. Dornberger.
Q. Doctor, I might ask you, if you please, to speak as loudly as you can. Look over toward the jury. Sometimes it is a little difficult to hear in this Courtroom.

Mr. Sams:
If any of you do not hear the doctor, raise your hands, and we will have him speak louder.

Q. Are you engaged in the practice of medicine?
A. Yes, sir.
Q. Where is that, Doctor?
A. Fort Lauderdale, Florida.
Q. Are you engaged in any specialized field of the practice of medicine?
A. Yes, sir, internal medicine.

Q. Dr. Dornberger, what is your business address?

A. 866 Northeast 20th Avenue.

Q. Are you associated with anyone else?

A. Dr. Thomas L. Roberts.

Q. Do you and Dr. Roberts both specialize in internal medicine?

A. Yes, sir.

Q. Doctor, would you state for the jury briefly what your educational qualifications have been to prepare you for your specialty of internal medicine.

A. I graduated from the University of Nebraska Medical School in 1938. I had internship, residency, which was interrupted by about four years in the AUS, Army of the United States.

Then, for the next seven years, I limited my efforts to the field of internal medicine at the Mayo Clinic. Subsequently, I became a member of the American Board, Diplomate of the American Board in internal medicine.

Q. Doctor, what were the years that you were at the Mayo Clinic?

A. 1945 to 1952.

Q. You say during that time you did nothing but internal medicine?

A. That is correct.

Q. What was your position at the Mayo Clinic?

A. I had three years on a fellowship; then an assistant to the staff, and then a consultant in internal medicine.

Q. For how long were you a consultant?

A. Three years.

Q. While you were in the service, were you then practicing medicine?

A. Yes, sir.

Q. Were you specializing in internal medicine?

A. No, I was not.

Q. That was general practice?

A. That is rather difficult to define. I was a doctor in the Army of the United States, which meant that we had numerous and sundry jobs. I was a flight surgeon for a time and later transferred to a general hospital.

Q. Dr. Dornberger, after leaving Mayo Clinic, where did you then go?

A. Fort Lauderdale, Florida.

Q. Have you been engaged there in the private practice of medicine since that time?

A. Yes.

Q. Are you a member of any other societies within your own specialty or in the field of the practice of medicine other than the American Board of Internal Medicine?

A. Only the usual, the Broward County Medical Association, the Florida State Medical Association, the American Medical Association, the usual things.

Q. Your membership in the American Board of Internal Medicine, is that an honorary membership, Doctor? Do they give that to everyone who practices in the field of internal medicine?

A. No, that is not true. There are definite board requirements. As I recall it, after internship, there must be at least three years of formal training limited to the field of internal medicine, followed by two years of practice limited to internal medicine, following which one may take the written as well as an oral examination, and when successfully passed, he becomes a Diplomate of the American Board of Internal Medicine. That is what we choose to call certification.

Q. And you are so certified?

A. Yes, sir.

Q. Doctor, have you had occasion in your practice of internal medicine to see and examine Dr. Edgar W. Stokes, the plaintiff, who is sitting right here (indicating)?

A. Yes, sir.

Q. Can you tell us what the date of that examination was?

A. I first saw Dr. Stokes professionally on the morning of April 24, 1954. At that time he came to the office, and an electrocardiogram was taken. He was examined briefly and sent to Broward General Hospital, where he was under my care.

Q. Doctor, feel free to refer to your briefcase. I notice you have your briefcase. If you have any notes of your examination, feel free to refer to them at any time you like.

Can you tell us, Doctor, how he came to your office? Do you know that? Had you ever seen him before, or was he sent to you? How was it he got to you?

A. I had never seen Dr. Stokes professionally. He was referred to our office at an earlier date for an electrocardiogram by a local physician. The electrocardiogram was taken by my associate and interpreted, and when the question of chest pain of this acute illness for which he was seen came up, naturally, he called our office, and I happened to be in, so I saw Dr. Stokes professionally.

Q. I understood you to say that after a brief examination of Dr. Stokes in your office, you sent him to the Broward General Hospital?

A. That is correct.

Q. What did you have done for him, Doctor, or did you go immediately to the hospital with him? Will you tell us what was done for him in the hospital.

A. Very briefly, his son is a doctor. He had been visiting with him. I received a telephone message from his son that approximately thirty to thirty-six hours before he was seen in my office, the doctor awakened in the middle of the night with a severe chest pain which radiated to the left shoulder, and it lasted about two hours. He was reluctant to do anything about it, but the next day, particularly the next evening, the son became somewhat concerned, because he was running a low-grade fever. His color didn't look too good. He was quite pale, and still he refused to see a doctor.

But the next morning, when the pain persisted, the son called my office, and I told him to bring him to the office. So, he arrived at the office. An electrocardiogram was taken.

Q. Was it taken in your office?

A. It was taken in my office. I read it. I examined him briefly. He had a low-grade fever.

Q. Doctor, wait a minute. Let me get these things as they came along.

The first thing you did was to take an electrocardiogram?

A. That is correct.

Q. Will you tell the jury, and tell me, what an electrocardiogram is. What do you mean by an electrocardiogram? I think most of us know, but possibly some of us do not.

A. Well, very briefly, the mechanism of the heart is an electrical current. That's what makes the heart beat. If there is an area of damage or lack of oxygen to the heart, it is manifested by changes in this electrical current which can be recorded on a graph, which we choose to call an electrocardiogram.

On the basis of the tracing that was taken in my office, I suspected that he had an acute myocardial infarction, which means in plain English, he had a mild heart attack.

Q. What is that?

A. A mild heart attack.

Q. And you called that an acute—

A. Myocardial infarction or coronary thrombosis or coronary occlusion. Again, in simple terms, what President Eisenhower sustained recently, a heart attack.

Q. Doctor, you did an electrocardiogram. That was the first thing you mentioned. Then you said you took his temperature?

A. Yes.

Q. Do you recall what his temperature was?

A. 99.2.

Q. Is that what you term a low-grade fever?

A. That hour in the morning, and it is stated in my record that the son, who is an M.D., had taken it the evening before, and it was 100.4. That represents a low-grade fever.

Q. What was his general condition? Can you describe that to us at the time he was in your office?

A. He appeared somewhat pale. He was extremely apprehensive and was somewhat short of breath. Blood pressure was 120/80, which is a normal reading. However, I might mention that on previous occasions the blood pressure had been recorded at 146/82, and with an incident like this, that makes us suspicious of an acute heart attack, when the blood pressure drops.

Any other physical findings were of no significance.

Q. No significance?

A. No

Q. Doctor, I have here what is marked Plaintiff's Exhibit #1. This purports to be the hospital record of the North Broward General Hospital. Will you look at that, Dr. Dornberger, and tell me whether or not that is the hospital record which was made by that hospital on the admission of which you have just spoken to us.

A. Yes, sir.

Q. On the first page, if you will let me hold that so I can read it, because I cannot remember all, it states myocardial infarction, posterolateral, acute, mild. Is that correct?

A. I would like to clarify that. On the front of the sheet, we are required to make an admitting diagnosis. It appears here myocardial infarction suspect. Now, there are several reasons why we do that. In other words, at the time he was admitted, I was not sure that he had a heart attack, so-called, and it develops that this man has insurance and so on, or later wants to take out insurance policy and somebody makes a definite diagnosis of myocardial infarction, he wouldn't get the policy. So, that just means we are suspecting. If you will note the next line, the final diagnosis, that means that after the patient is dismissed from the hospital, we are required to write down what I, as the attending physician, felt the diagnosis was. That diagnosis is myocardial infarction, posterolateral, acute, mild. In plain English, that is a mild heart attack.

Q. The word "acute," what does that mean? Does that mean present, at that time?

A. That means that it came on thirty-six hours before hospital admission.

Q. And the mild is the definitive of the severity or the nature of it?

A. That is correct.

Q. An acute condition?

A. That is correct. At first, President Eisenhower was thought to have a mild attack, and subsequently, I believe it was moderate as contrasted to severe.

Q. Referring to those hospital records, if you will, what tests were run on him in the hospital that were significant in so far as you are concerned? You have stated to us that your initial diagnosis was a myocardial infarction suspect. Your final diagnosis was a more positive diagnosis of myocardial infarction, posterolateral, acute, mild. What were the significant developments during the course of his hospitalization, Dr. Dornberger, which made you make that final diagnosis?

A. I remember this case quite well for several reasons. In the first place, he is a doctor. It is a rule of thumb that it is difficult to take care of doctors, and this man is no exception. His story was extremely difficult to evaluate. He was having pain here one minute, pain in the shoulder the next minute. He was extremely apprehensive, talking about his father who died of a coronary disease. He was going to die of the same, and so on.

When we rechecked him in the hospital, he was fairly comfortable, and we took numerous further electrocardiograms. Because he was a doctor, and because the situation was not clear-cut, I asked my associate, Dr. Roberts, who had seen him before, to see him in consultation, and he did not feel that he was having an acute heart attack, and thought it was best to reassure Dr. Stokes, because he was so tense an anxious and was practically impossible to keep in bed.

Q. That is your associate, Dr. Roberts?

A. I am quoting from the record as I saw it

Q. In other words, Dr. Roberts did not agree with your initial opinion?

A. That's correct.

Now, at the time of the admission, which was approximately thirty-six hours after the onset of his original pain, the white blood count was about twice normal. As I stated before, he had a low-grade fever. Another test which we do, the so-called sedimentation rate, usually is normal at the onset, but if we are dealing with, as in this instance, a so-called heart attack, which means a little blood clot in the vessel which causes death of tissue, and it takes several days to produce this fever and elevate this sedimentation rate. At the time of his admission, the sedimentation rate was 6. Five days later, it was 28, which is about twice normal, and it was repeated a few days later, and it was still elevated, as was the white blood count.

In view of that, and because there was some question in my mind as to whether or not this man actually had an acute heart attack, so-called, or whether he had—my associate used the terms myositis, neuritis, in plain English, again, an acute rheumatism—I used another, shall we say, senior internist in our community, who enjoys a good reputation, to see Dr. Stokes in formal consultation, which means that he was requested, as was Dr. Roberts, to fill out a consultation sheet.

Q. Who was that doctor?

A. Dr. E. C. Chamberlain.

Q. Did he then examine Dr. Stokes, to your knowledge?

A. Yes, sir. He examined Dr. Stokes and gave us an opinion.

Q. Is that opinion in the hospital records that you have there?

A. It is in front of me now.

Q. I wonder if you would read to us what Dr. Chamberlain said.

A. This is dated June 2, 1954, which was approximately one week, around eight days, after admission.

A confirming history is elicited which can be interpreted as either consistent with a small myocardial infarct or a brachial plexus neuritis or myositis of shoulder girdle. Nothing is added to the picture by the physical findings. Study of the serial electrocardiograms—that means the several tracings that had been taken—suggests a small posterior myocardial infarct. With these changes was a transient leukocytosis and an increasing sedimentation rate. Five days has elapsed since the last electrocardiogram, so I think another tracing might be helpful at this time.

Now, his diagnosis and recommendation: In an attempt to resolve the above dilemma, I lean uncertainly to the diagnosis of a small posterior lateral myocardial infarction.

It is signed Dr. Chamberlain.

Q. In other words, this doctor uncertainly leans toward the mild heart attack that you have described to us?

A. Well, I would like to quote further from the record in summary. There was a lot of thought put to this. As a matter of fact, it is in my record that I have had curb-stone consultations with several other doctors, which means that I presented the tracings to them, presented the story, and showed them the findings and said, "Look, we are in trouble here. What do you think?"

In all, there were six internists who expressed an opinion, but only three of them who are quoted directly in the record.

I summarized this in my discharge note dated June 5, 1954.

"In summary we have a 56 year old physician who has not practiced medicine for approximately two years because of the residuals and sequelae of an automobile accident. His father died of coronary heart disease at the age of 52. Thirty-six hours prior to the admission to this hospital on 5-24-54, he was seized with severe pain in the left precordial region in and about the left shoulder girdle which has never been clearly defined by the patient." That means the region about the heart.

"However, his wife and son, who is an M.D. confirms the presence of a low-grade fever 24 hours after the onset and stated that he was definitely short of breath and appeared very pale. The electrocardiogram which was taken in the office approximately 36 hours after the onset of the pain showed some segment changes"—that is the change in the electrical current that I mentioned briefly before—"and it was felt that it was best to hospitalize him for further observation. His subsequent course in the hospital revealed leukocytosis"—which means an elevated white count—"low-grade fever and the sedimentation rate went from 6 on admission to a high of 28 on 5-29-54. The electrocardiograms were certainly not diagnostic but were most suggestive of myocardial damage. It was the concensus of opinion of the internist who saw him that the clinical diagnosis was posterolateral myocardial infarction acute of mild degree. This is the final diagnosis and he will be continued to be treated in this manner. Dismissed."

Q. Dr. Dornberger, how many electrocardiograms were taken while he was in the hospital? Are those shown in the hospital records?

A. There is a copy of each of the electrocardiograms that were taken in the hospital, and there are one, two, three, four.

Q. All right, sir. May I ask you if you will, please, to put your notes down for a second and step down in front of the jury.

Will you show the jury, hold it up so they can see what you are speaking of when you talk about electrocardiograms. Those are tracings, are they, Doctor, that are made on a machine?

A. Yes, sir. These are photostatic copies of the tracings.

Q. Yes, sir. The originals are in the hospital records. Is that correct?

A. That's correct.

Q. The photostatic copies that you are looking at would be just as easy to read as the originals, would they not, Doctor?

A. That's correct.

Q. Doctor, I want to ask you whether or not you find in those electrocardiograms anything unusual or anything that would indicate an abnormality, or are they within normal limits?

A. This first tracing in the hospital record was taken twenty-four hours after the tracing in my office, and the subsequent tracings were following this one.

These tracings in themselves do not mean too much. The interpretation of the first one, we describe some changes which mean nothing to you, but we are asked to give an opinion when we read these. As compared to the four previous tracings in the office, the last of

which showed some elevation of the ST segments and leads two and three with upright T waves suggests acute myocardial damage.

In other words, the impression here was taken on the basis of comparison of the tracing in the office as compared to this one. These tracings do not mean much in support of the diagnosis except that there is a change from the record that was taken in the office.

Q. If you had nothing to go by but those tracings right there at which we are looking, nothing but that, had made no examination of Dr. Stokes and did not have the benefit of the sedimentation rate, the low-grade fever and that sort of thing, would it be your opinion that those tracings were within normal limits?

A. I am sure I could not diagnose an acute myocardial infarction from those tracings alone.

Q. Do you have with you the tracings you took in your office which you have described to us as being the ones taken some thirty-six hours after this episode?

A. Yes, sir, I do.

Q. Do you have in your office an electrocardiograph machine? Is that the correct name?

A. Yes, sir.

Q. Did you take these tracings yourself, or are they taken by someone under your supervision?

A. They are taken by a laboratory technician.

Q. Were these tracings that you have handed me tracings taken in your office?

A. This tracing was taken in my office on 5-24-54, which was the date of admission to the hospital.

Q. Is that the tracing of Dr. Edgar W. Stokes?

A. That's correct.

Mr. Sams:
I would like to offer this in evidence as Plaintiff's Exhibit #4.

Mr. Carey:
No objection.

The Court:
It will be admitted.

(The document referred to was received in evidence as Plaintiff's Exhibit #4.)

Q. Have you taken other tracings of Dr. Stokes prior to this one?
A. Yes. There were previous tracings and, as you can see, there have been innumerable tracings since that time.
Q. Do you have with you the tracings that were taken before this one?
A. Yes, sir.
Q. I wonder if you would let me hold those for a moment.
A. There were three.
Q. These are dated as to the dates they were taken?
A. That's correct.
Q. They were taken in your office?
A. That is correct.
Q. They are of Dr. Edgar W. Stokes?
A. That's correct.

Mr. Sams:
Is there any objection to the introduction of these?

Mr. Carey:
No.

The Court:
They will be admitted as Plaintiff's Exhibits #5, #6 and #7.

(The documents referred to were received in evidence as Plaintiff's Exhibits #5, #6 and #7, respectively.)

The Witness:
I might add that they were interpreted by my associate, Dr. Roberts, and read as normal.

Q. I want to ask you some questions about them. You are able to interpret these, are you not, Doctor?
A. Yes.
Q. Have you had an opportunity since that time to examine these yourself, the three previous ones?
A. Yes.
Q. Have you independently looked at them?
A. Yes.
Q. Does your opinion agree with that of your associate that they are normal?
A. I am sorry. The three tracings taken prior to May 24, in summary, the only abnormal electrocardiogram I have ever seen on this man, and I have seen a lot of them, was the one taken on May 24, 1954, in my office.
Q. In other words, this one right here that you took the morning of his admission to the Broward General Hospital is the only electrocardiogram that has ever been seen by you on Dr. Stokes out of all these you

have and the ones at the hospital that you interpreted as being abnormal?

A. Correct.

Q. What I wanted to know, and the reason I got these in, Doctor—

Mr. Carey:
Just so we might know, what is the date of that one?

Mr. Sams:
That one is May 24, 1954.

Mr. Carey:
That is Exhibit #1?

Mr. Sams:
That is Plaintiff's Exhibit #4.

Q. I do not know if this is possible, but I am going to ask you to try to show the jury, if you can, where the abnormality in this is and, if possible, to show any comparison with any other electrocardiogram, or describe to us what the abnormality is in this electrocardiogram. Can you do that, Doctor?

A. We do this sometimes, although I am not so sure it is wise.

Q. You might come over here so they can all see. If you cannot see, put up your hand.

A. There are twelve different leads, which means the same thing as taking twelve different photographs of the heart muscles, so to speak.

The only significant changes in this record are what we call the ST segments, which are these (indicating). This is where the heart beats, in here, so-called (indicating).

Now, there is a base line here (indicating), and this so-called ST segment is slightly elevated. I think you can see that as compared to other tracings where this segment of tracing is on the same level.

That is what we call a slight elevation of ST segment in leads two and three. That is the sort of thing that makes us suspicious that the back side of the heart is not getting oxygen. That's what it means in plain English.

Q. Along with that, Doctor, what is the significance, number one, of the low-grade fever? Is that a usual symptom in this sort of thing?

A. The only way I can explain that is to explain these terms as best I can.

There is a large artery which supplies oxygen to the heart muscle in the front side, which we call anterior. There is one on the back side, which we call posterior, and they have branches. Now, if the heart muscle, which requires a lot of oxygen in order to beat, becom s short on oxygen, usually the patient has a sensation of pain or discomfort in the chest or in the shoulder or in the arms, and we call this angina or angina pectoris. That may be caused by a little spasm where there is a temporary lack of oxygen, so to speak, and one gets relief with nitroglycerin. So, we speak about coronary sclerosis. That is an assumption that if a patient has angina pectoris he also has some narrowing or damage to the coronary blood vessels per se, if he has the angina. Now, the basic disease, then, would be coronary sclerosis. If there is a little blood clot, if one of these arteries that supply the oxygen—we speak of occlusion or thrombosis. Now, the area of the heart muscle supplied is thereby deprived of its oxygen and it dies, just the same as you have seen people or heard about

people who get a black toe or gangrenous toe from lack of blood supply. Associated with that, then, it will produce an increased sedimentation rate, a low-grade fever and increased white blood count. Those are what we call objective findings which make us think in terms of a small blood clot in the heart as compared to a spasm. So, those things in this particular man were important. He starts out with the pain. He gets shock. He does not look well, and twenty-four to thirty-six hours later, he does have fever. He does have an increase in the white blood count. There was one change in the electrocardiogram, and even though his subsequent clinical course was that of a mild infarction, in my opinion, we never know those things at the onset. As you may well know, they suggest that it would be two weeks before they knew whether President Eisenhower had a mild or moderate or severe or what was going to happen. That's the reason for putting a patient in the hospital and repeating the tests and checking him every day.

So, those things were very important to me, and in the final summary of this hospital admission, they were very important to everybody who saw him. In other words, the only safe thing to do was to treat him as if he had an acute myocardial infarction, which means a small blood clot on one of the small blood vessels to the back of the heart.

Q. Dr. Dornberger, were you Dr. Stokes' treating physician in this particular episode, that is, as far as the internal medicine question was concerned?

A. From the standpoint of his heart trouble, if you so desire, I have been his attending physician since I admitted him to the hospital on that date.

Q. What was that date again?

A. 5-24-54.

Q. After his discharge from the hospital, have you seen him in your office?

A. Yes, sir, on innumerable occasions.

Q. Can you give us any idea, Doctor, how many times you have seen him? You do not have to go through all your records, unless you have them there.

A. I don't believe I have that information. I think one can tell from the size of this that I saw him very frequently for the first several months following the hospitalization. I have seen him on numerous occasions since. We have had repeated electrocardiograms. I have had to see him many, many, many times.

Q. Doctor, I want to ask you this question: In your opinion, from the history elicited from Dr. Stokes, and from your repeated examinations, and from the various tests that you have made, is it your opinion that Dr. Stokes is disabled as a result of the myocardial infarction, posterolateral, acute, mild, that he suffered for which--

Mr. Carey:

That is objected to as being leading.

The Court:

Yes. I think I will sustain that objection.

Mr. Sams:

I am sorry, Your Honor.

The Court:

On the ground it is leading.

Mr. Sams:

This is an expert witness. I think you have some right to lead him. I just asked his opinion.

The Court:
You have some right, but it is still leading. Do it another way.

Q. Do you have any opinion as to whether or not Dr. Stokes—

Mr. Sams:
We will get two different opinions from this doctor, one on the heart and—

The Court:
All right.

Q. Do you have any opinion, Doctor, as to whether or not Dr. Stokes is disabled?

Mr. Carey:
I object to that question unless it refers to disabled from what.

Mr. Sams:
That is what I asked the first time, and that is what I thought was objected to.

The Court:
I will let him answer that. He could be disabled and not be disabled under the terms of this policy. You are probably leading up to that.

Mr. Sams:
I will ask the reason. I want to get the reason. There will be several different opinions from this doctor.

The Court:

Answer that. Is he or is he not disabled, in your opinion?

The Witness:

In my opinion, he is disabled.

Q. Can you tell us, Doctor, to what extent, in your opinion, Dr. Stokes is disabled?

Mr. Carey:

Again, if the Court please, disabled from what?

Mr. Sams:

I will connect this up.

The Court:

He stated he will connect it up. If he does not, you may move to strike.

Mr. Sams:

I will connect it as to what he is disabled from, and if not—

The Court:

I think we better adjourn until 1:45.

(Whereupon, at 12:10 p. m., a recess was taken until 1:45 p. m.)

Afternoon Session.

1:45 p. m.

The Court:

Do you each consent the jury is present and waive the polling thereof?

Mr. Sams:
Yes, sir.

Mr. Carey:
Yes, sir.

The Court:
You may proceed.

Thereupon, GEORGE R. DORNBERGER, resumed.

Direct Examination (continued):

By Mr. Sams:

Q. I believe, Doctor, the last question I asked you —I can have the reporter read it back—was to what extent you feel Dr. Stokes is disabled.

Mr. Carey:

If Your Honor please, I repeat the same objection.

The Court:

I will permit it as a preliminary question to develop material matters. You may move to strike this testimony if it does not develop into something material.

Q. To what extent do you feel he is disabled, Doctor?

A. I believe I said in answer to your question that I felt he was disabled. I think he is totally disabled from a medical standpoint, in my opinion.

Q. When you say "totally disabled from a medical standpoint," do you mean totally disabled from following the profession of the practice of medicine?

Just what do you mean by "totally disabled," Doctor? Is that an occupational disability?

A. Yes.

Q. Do you feel that this man would be able to engage in any type of gainful occupation?

A. In January of 1955, in one report that I made in writing in answer to that question, I stated that in my opinion it is extremely doubtful whether he will ever be able to engage in any gainful occupation.

Mr. Carey:

I move that be stricken as not responsive. He was asked the question as to whether he is disabled now.

Mr. Sams:

That is what I am going to ask him.

The Court:

Let us come to the point. What is your opinion about his being able to engage in gainful occupation at the present?

The Witness:

My opinion has not changed, sir.

Q. In other words, Doctor, it is your opinion at this time that Dr. Stokes is totally disabled from engaging in any gainful occupation?

Mr. Carey:

I object to that as being leading, if the Court please.

The Court:

Sustain it on the grounds of repetition, too.

Q. Doctor, would you state your reasons for your opinion; that is, why do you feel Dr. Stokes is totally disabled medically?

A. As his attending physician—in a sense an internist is a family physician—I have had occasion to see him as a patient on many occasions since the hospital episode that I described. In making that statement, I feel that there are several conditions which enter into the total picture. By that I mean every time I have seen him, and that includes the initial hospitalization, there has been a great amount of anxiety. He complains of numerous and sundry things, such as bursting in the head, forgetfulness, inability to concentrate. Almost without exception when he comes to my office, he has written down in tabulated form a number of simple questions that he wants to ask me. If he does not write them down, apparently, he does not remember.

So, there is a great amount of confusion. He has had, in my opinion, a heart condition which we have rechecked and rechecked. From that condition alone I would say that if it were not for the anxiety factors and the question of head injury with the residual symptoms from this auto accident, and I am taking the word of fellow doctors who have seen him, I would not say that the heart condition in itself would be disabling. But it is the over-all picture as I see this man when he walks into the office, by the questions he asks me, by the symptoms he presents and so on that I have rendered continuous reports to various companies to the effect that in my opinion he is still totally disabled.

Q. Do you feel, Doctor, that this man in the condition you have described to us would be capable of practicing medicine?

A. I can only give you my opinion, and the answer is no.

Mr. Sams:
I believe that is all I have.

Cross Examination.

By Mr. Carey:
Q. Doctor, your testimony, I believe, has been silent as to any electrocardiograms taken following May 24, 1954.

The Court:
He said he found no abnormality, nor any indication in those electrocardiograms alone of the ailment. Is that correct?

The Witness:
I believe it is a matter of record that I testified that in three previous tracings, and in numerous, innumerable—there is a stack of them in here that have been taken in my office since he was discharged from the hospital, and we interpreted them as being normal.

The Court:
Only once did he interpret them to be abnormal. Is that correct?

The Witness:
That is correct, sir.

The Court:
That was the one he took the morning—

The Witness:
The morning he had the chest pain.

The Court:
That is when he went to the hospital?

The Witness:
That is correct.

Q. Do I take it, Doctor, in your opinion, the man has made an uneventful recovery of what you diagnosed as a mild myocardial infarction as of April of 1954?

A. Yes, in so far as we can determine. The difficulty that we have is that as a patient, he still complains of chest pains, shortness of breath, which are subjective symptoms, and it is difficult at best in this instance to be sure whether or not they are actually pains of coronary disease, or whether they are what we call functional pains, chest wall pains.

Q. Would you explain to the jury what you mean by functional pains as distinguished from pains with an organic source.

A. In this instance, we are interested in whether or not he has any chest pain which may be due to the lack of oxygen in the heart muscle, namely anginal; whether or not the pain is functional. By that I mean there is no organic basis for the pains in the sense that he has severe narrowing of the coronary arteries.

Q. Do I understand that by functional symptoms you mean symptoms that are brought about, for example, from psychological or psychiatric sources rather than symptoms which find their origin in some disability, some physical disability? Is that the general distinction between functional and organic?

A. That's what I am trying to ay.

Q. In coming to your conclusions, I believe that you have diagnosed an acute myocardial infarction. May we take that by degrees.

What do you mean by acute?

A. We use three terms medically, acute, subacute and chronic. Acute means that it is a current, present, illness. In this illness it means a matter of hours or days.

Q. Acute does not mean severe. It means coming on very recently. Is that correct?

A. That is correct.

Q. The mild portion of your diagnosis—would you describe the degrees of severity?

A. Yes. In this instance, we are describing as best we can by that term the extent of the blood clot or the clotting of the coronary artery which causes the damage to the heart muscle.

Q. I mean, there is a mild and then severe?

A. Mild and moderate and severe.

Q. This, then, was in the least order of severity. Is that correct, sir?

A. The least that we could diagnose.

Q. Yes, sir.

That was a doubtful diagnosis, too, was it not, Doctor?

A. Yes, sir.

Q. Would it not be altogether reasonable to assume that a heart condition of that mildness, he would recover from it within a matter of a few months?

A. Yes. That is true.

Q. When was the first electrocardiogram, Doctor, that you took following May 24, 1954, which did show a normal tracing?

A. I think I testified that the four tracings that were taken while he was a patient in the hospital could not be interpreted as showing definite evidence of heart disease.

The Court:
They are in evidence, I think, counselor.

Q. They are within a few days?
A. The first one was twenty-four hours after the one was taken in my office.
Q. When was the next series that were taken, Doctor, that would show a normal heart, normal tracings?
A. If I have these in order, there is June 21, 1954, July 5, 1954, August 23, 1954.
Q. Those were all normal, were they not, Doctor?
A. I have four others, if you are interested. The last of these was on the 29th of September, and in my opinion, in my interpretation, they were all interpreted as being within limits of normal.
Q. Is it not your opinion, Doctor, that he did make a routine and normal recovery within a matter of weeks from the time of May 24, 1954?
A. In this situation, it is difficult to evaluate his symptoms, as I have testified. If we were dealing with an individual who had always been perfectly well and had these symptoms, and we made such a diagnosis, he had no further chest pains, no fever, no shortness of breath and felt well, we would put this man back to work as soon as we thought it was entirely safe, which would be usually within a matter of three months. There have been too many complicating factors in this instance.

Q. Doctor, is it not true that the complicating factors in this case are the various and sundry subjective complaints that this patient presents to you?

A. Yes. That is true.

Q. By subjective complaints, Doctor, we mean complaints that are within the control of the patient rather than those which you can observe as an objective thing by seeing or by demonstrating on electrocardiograms or in some other manner? Is that not true?

A. Yes. In a general way that is true.

Q. Is it not true, Doctor, in coming to your diagnosis that this man's subjective complaints—in other words, his story of what he claimed he was going through or what he claimed happened to him—played a great part in your diagnosis?

A. No. That is not true. I have always testified that there were several objective findings at the time of his hospital admission.

Q. Those findings, of course, were consistent with other illnesses, too?

A. Yes. That is true.

Q. There could be other things?

A. Yes.

Q. Which would cause the same type of symptoms?

A. Yes.

Q. For example, you suspected, or one of the doctors thought, it was a myositis rather than a heart condition?

A. That is true.

Q. Would you explain to the jury what a myositis is.

A. I explained to them that the doctor used the terms myositis or fibrositis to mean an acute rheu-

matism, so-called. Perhaps if I said an acute lumbago, instead of being back here (indicating), it involved the muscles of the chest and shoulder. That is what we meant by an acute fibrositis or myositis.

Q. Is it not true, Doctor, that a lot of people mistake these little pains that they have that are either from a myositis or in some cases some form of arthritis as being heart pains?

A. That is true.

Q. I gather, too, that in your coming to the conclusion that this man was disabled, that it was principally by reason of his anxiety; in other words, his mental outlook?

A. I would say that is true after the first three months. After all, I had a decision to make as the attending physician, and I made the decision that in my opinion he did have an acute myocardial infarction.

Q. I understand.

A. But as you have suggested, following a three-month period of observation; without any further objective findings, particularly with reference to the electrocardiograms, in my opinion if he had a small clot with a small patch on his heart, it was healed, and we have tried to reassure him as to that situation.

Q. Doctor, what I am getting at is this: I believe that it is your opinion, then, that his anxiety or the appearance of this mental outlook, this condition, is what is the disabling factor in your mind rather than any heart condtiion which he had?

A. That is correct.

Q. Now, then, Doctor, would not that be within the field of a psychiatrist?

A. Not entirely.

Q. It would certainly fall within the field of a psychiatrist, would it not?

A. Yes.

Q. Was it ever suggested that he see a psychiatrist.

A. I believe he has been seen by numerous psychiatrists.

Q. Has he seen any psychiatrist as an examining psychiatrist, to your knowledge; I mean, as his own psychiatrist rather than someone examining him for purposes of testifying or otherwise? As a treating psychiatrist, has he had any treating psychiatrist?

A. I am not sure. In my notes of July, 1955, we discussed one of the local psychiatrists.

Q. You do not know whether he went to him or not?

A. Well, my subsequent notes do not bear out the fact that he did. But, as I recall in conversation, I was beginning to feel this way: that he needed psychiatric help.

Q. Doctor, did you take into consideration the possibility that his anxiety neurosis or anxiety condition may have been affected by the pendency of claims against insurance companies?

A. Yes, indeed.

Q. You took into consideration the pendency of lawsuits having any effect on his outlook, temporary or otherwise?

A. Yes, I did.

Q. Do you not feel that that would have a great bearing upon his temporary outlook, until the disposition of such claims and losses?

A. I don't believe I am in position to answer that for this reason: that I have as a matter of record in my first observation of this man, and that means

the hospital record, that in February of 1952 he was in an automobile accident.

Q. Yes, sir. Now, you have no information about an automobile accident, sir, except as to what came from the patient himself and appears in the hospital record, have you, sir?

A. I would qualify it this way: The admission to the hospital at the time or shortly thereafter was available to me as attending physician, and that's where I got most of my information. I also talked to the physician who took care of him, because it was of great interest to me to find out what type of injury he had or what kind of accident and so on, so that I might better evaluate his heart condition situation.

Q. What physician was that, sir?

A. Dr. A. R. Taylor. I believe he was the attending physician on that occasion.

Q. That brings me to my next question.

Is it not true that a great part of your diagnosis of this case was based on this man's history, that is, as to his having told you, or somebody else, that he had a concussion; his having told you that he had an electrocardiogram some years ago which showed that he had a myocardial infarction? Those things were all taken into consideration in your arriving at your conclusion?

A. Would you repeat the question, please.

Q. Yes, sir.

Is it not true that a great deal of your diagnosis was based—a great deal, I should say, of your consideration in coming to your diagnosis was based on the history of this man; that is, history of a prior accident, a history of a prior myocardial infarction and so forth?

A. By "great deal," I would say, in answer to your question, yes. It was a big factor, which was intensified by my own observations of the patient.

Q. The one electrocardiogram that you took which showed a slight variation on May 24, 1954, was so slight that experts differed as to whether it was a significant change at all, did they not, sir?

A. I believe I stated that in my summary the electrocardiographic change per se was not diagnostic.

Q. That answers my question. Per se, the electrocardiograph changes were not diagnostic and, therefore, his personal and subjective symptoms to you became very, very important, did they not, sir; his relating to you that he had certain pains in certain places, and that he had them previously became very important to you in coming to your diagnosis?

A. I must qualify that. Do you mean by my diagnosis about his hospital admission, or about his subsequent course and his present condition?

Q. I am talking, sir, about this: that the E.K.G. was not, in your own words, a diagnostic change. In other words, the change was not significant enough to diagnose a heart condition.

A. That is correct.

Q. There were a couple of objective things which you saw which would be just as compatible with some other difficulty, some other disease, temporary or not?

A. Yes.

Q. The deciding factor, then, was the subjective symptoms that this man presented, was it not?

A. No. In this sense, as I have already testified, when I see a man who has chest pain, fever, elevated white blood count, a questionable change in the electrodardiogram, a man of this age, a man of this build

—he is a so-called coronary type—in my opinion, this man has coronary sclerosis. Therefore, until somebody tells me differently, I am going to treat him and consider that he has an acute infarction. That is what I did.

Q. Is it not, as you said on direct examination, under the circumstances a safe diagnosis to make?

A. That is correct.

Q. Refer to your hospital records. Do you have it there, Doctor?

A. I have it.

Q. You have the hospital record?

A. I have most of it.

Mr. Carey:

Do you have it, counselor?

Q. Doctor, I would like to hand you the hospital records which have been admitted in evidence. I would like you to refer to the sheet which is dated May 24, 1954. I presume you state this history because it is significant to you, and you are taking it into consideration in coming to a diagnosis. Is that not true, sir?

A. Are you talking about this sheet (indication)?

Q. I believe that is it.

A. Yes, sir.

Q. That is the sheet that is signed by you, Doctor, is it not? It is signed at the bottom?

A. That is correct.

Q. Is not the history you put on a sheet like this—the reason for that is that you consider it significant to the particular case in coming to your diagnosis?

A. Yes, sir.

Q. You state here toward the end of this long paragraph, "He also"—referring, I take it, to Dr. Stokes— "He also states that he had a heart attack about four years ago but no electrocardiogram was taken for about three months. He states that this electrocardiogram was interpreted as showing evidence of myocardial infarction."

Did he tell you where that electrocardiogram was taken four years prior to 1954?

A. That is not a part of this record. I believe that it was taken in Louisville.

Q. Louisville?

A. Yes.

Q. Was that the electrocardiogram that was taken by Dr. Woodford B. Troutman of Louisville, the heart specialist?

A. I am sure that he has taken a good many through the course of the years.

Q. Did Dr. Stokes tell you as part of his history so that you could come to a diagnosis that Dr. Woodford Troutman in Louisville diagnosed him as having had a heart attack from Dr. Troutman's E.D.G. examination?

A. Yes. That is part of the record.

Q. That is part of what Dr. Stokes told you so you could come to your correct diagnosis?

A. It was part of the history that is in there.

Q. You relied upon the truth of that statement in coming to your diagnosis, did you not?

A. Not necessarily.

Q. In part?

A. In part, yes.

Q. Doctor, you also relate in this same sheet that he sustained a cerebral concussion in February of 1952. You relied, I take it, on that as being part of a correct statement of his history?

A. I can't recall whether the patient told me that or whether, as I mentioned, Dr. Taylor told me about that. That was part of the past history which I incorporate in the record.

The Court:

The point is that you did rely upon that statement, wherever you got it?

The Witness:

That is correct.

Q. Doctor, referring now to a page, the first date of which is 5-26-54, marked on my copy as page 4.

A. Yes.

Q. You consulted, I take it, with Dr. Roberts with respect to this man's condition, did you, sir?

A. Yes, sir.

Q. Is Dr. Roberts an internist, also?

A. Yes, sir.

Q. Does he specialize in heart conditions?

A. Anyone who limits himself to internal medicine is a heart specialist regarding the heart in this sense.

Q. It was Dr. Roberts' opinion that he, Dr. Roberts, favored the diagnosis of the left cervical an uppder thoracic myositis?

A. Yes. You have a complete record of his consultation.

Q. Yes, sir. I have the record before me, the hospital record such as you have.

A. Yes.

Q. Did he continue to disagree with you in his diagnosis, or did consultation cease at that point?

A. No. Perhaps I should say that Dr. Roberts and I practice together. We have our own building. We have a habit of seeing each other's patients, and as you can see he disagreed rather sharply with me at the time this was written. As the thing progressed, it was his opinion, and he wrote it in as an afterthought—this is his handwriting—could be wrong. History not typical. Left cervical shoulder myositis is definite. No Q wave in electrocardiogram, and ST and T changes while suggestive are not conclusive at this stage.

Q. I was coming to that, Doctor. By that he meant that he could be wrong, but in his opinion this was not history typical of myocardial infarction.

A. That's right.

Q. His pencil note was that it was a myositis. Is that correct, sir?

(No response.)

Q. Doctor, you never saw this man prior to May or April of 1954. What was the first date you ever saw this man in your life as far as you know as a doctor-patient?

A. May 24, 1954, when he came into the office.

Q. So, you are not in any position to express any opinion with respect to his condition of disability or lack of disability prior to that time?

A. That is correct.

Q. Did he mention to you at that time, Doctor, or some time during your conversations, that he wanted you to make medical reports to various insurance companies in connection with what he alleged was a total disability?

A. Yes, sir.

Q. You have stated, Doctor, that this man came to see you many times since his hospitalization in the latter part of May, 1954?

A. Yes.

Q. What course of treatment, if any, did you give him?

A. It has been rather difficult to treat this patient. As I have stated, we have found it necessary to take numerous electrocardiograms in an effort to reassure him as to the present status of his coronary blood vessels, and each time we tried to reassure him as to the nature of these numerous symptoms that he always presents.

We tried various medications. To be specific, we tried to give him Thorazine, which is a new drug, which is a drug that we give to calm people with tension states or anxiety states.

Q. Doctor, I do not want to interrupt you unduly.

A. You are asking me what I tried to do to help the man.

Q. All of these symptoms which you present were subjective through this period, were they not?

A. With the exception of one episode, which I think is irrelevant. I had to make a house call. He had an acute renal colic. He had a kidney stone.

Q. And by subjective, again, we mean complaints which he relates to you. He is telling you that he is worried or suffering some pain or other. Those are subjective things as against the things which you can find definitely as objective symptoms. Is that correct, sir?

A. That's right.

Mr. Carey:

I believe that is all, Doctor. Thank you very much.

Mr. Sams:

We would like to offer in evidence the electrocardiograms that were taken by Dr. Troutman, and I believe there is no objection to it on the part of the defendant.

The Court:

If there is no objection, they may be admitted.

(The documents referred to were received in evidence as Plaintiff's Exhibits #8 and #9, respectively.)

Re-Direct Examination.

By Mr. Sams:

Q. Doctor, I hand you a piece of paper and ask if you can tell what that is.

A. This is a photostatic copy of an electrocardiogram taken in May, 1946, in the office of Dr. W. B. Troutman, Louisville, Kentucky, on Dr. E. W. Stokes.

Q. Doctor, was that date that you have given us the approximate time that you testified when Dr. Stokes told you he was seen by Dr. Troutman and advised of some myocardial difficulty?

A. Well, in my history recorded in the hospital, I said about four years ago, which would have made it 1950. In the consultation sheet that Dr. Roberts wrote, he stated that his first electrocardiograph was about six years ago. It was told that he had a heart attack, which was manifested by T waves. That information, to the best of my knowledge, was obtained through the patient.

Q. I did not understand. That information was elicited—

A. From the patient by Dr. Roberts.

Q. I ask you to take a look at this electrocardiogram which was taken by Dr. Troutman, and I would like to ask you some specific questions about it, if you will study it for a minute. Is it possible to interpret that, Doctor, without having the original?

A. This photostatic copy is the equivalent of the original tracing.

Q. In other words, you can interpret that. Is that correct?

A. Yes, I think so.

Q. Can you tell me, Doctor, whether or not there is any irregularity in that?

A. Of course, this brings up a question that has not been discussed. It is extremely dangerous to try to interpret an electrocardiogram without seeing the patient. It is possible when changes are marked to make a definite diagnosis. Comparison with other tracings is always very helpful. I think if I were presented this tracing in 1946, as I am this minute, and asked to read it, I would say that it is suggestive of coronary disease. But there, again, there is nothing definite in it. I can compare it with tracings that we have now.

Q. Let me ask you this, Doctor: Referring to Lead I—I believe that is the top lead there—can you state whether or not the T waves are flattened?

A. The tracing taken in 1946 as compared to numerous tracings that I have on Dr. Stokes in my hand, the T waves are definitely flattened; that is, in this tracing that was taken in 1946.

Q. Let me ask you this, referring to Lead II and comparing it with the electrocardiograms that you

have taken: Is there some notching and slurring of the RS segments?

Mr. Carey:
I object as leading, if the Court please.

The Court:
Sustained.
Q. Doctor, would you describe to us—

The Court:
What is indicative, if anything, on that cardiogram of coronary disease?

The Witness:
First, I should like to say—

Mr. Sams:
May I say one word. On medical, where I am attempting to bring out testimony, I think the Florida case law is that I have the right to lead him somewhat.

The Court:
Somewhat, but not very much.

Mr. Sams:
Judge, I just request that I be allowed—

The Court:
Unfortunately, even an expert witness—I mean, we are all human. In my opinion, an expert above all people should not be lead, because he should give his expert opinion purely from his own. You can picture a set of circumstances and ask him to answer it.

Mr. Sams:

The only thing I was asking him to do is to state whether or not certain things were or were not present on this particular piece of paper. It is subject to cross examination.

The Court:

We want to have an end to this. Let him give his opinion.

Mr. Sams:

All right, sir.

The Court:

He can ask him about every detail.

The Witness:

I have tried to generalize, sir.

Mr. Sams:

I would just like to ask this one final question.

Q. Doctor, can you state from looking at that, or is it your opinion from that electrocardiogram, that at that time, that is, the time it was taken, there was some abnormality indicative of coronary damage or heart disease?

Mr. Carey:

Objected to as leading and repetitious.

The Court:

He said there was.

Suppose we frame it this way: What abnormality is there other than the one you have mentioned, if any?

Dr. Sams:
Perhaps I did not understand. If he already made the statement that it is abnormal, that is all I want.

The Court:
What did you say?

The Witness:
It would be suggestive of coronary sclerosis.

To clarify this, in 1946 it was customary to take only three or four leads. We now take twelve leads. The twelve leads give us more information than we could obtain from this. From this pattern, there are some of these changes and, again, these are highly technical, flattening of the T waves, slurring of the RS segments. Particularly in this extremity lead, flattening of the T wave, it is suggestive. But I would like to emphasize that it is absolutely stupidity on the part of any doctor to try to make a diagnosis of coronary disease on the basis of an electrocardiogram or any other laboratory finding. It is a clinical diagnosis, which means that the doctor tries to evaluate history symptoms, laboratory findings, everything. Then he makes up his mind.

Re-Cross Examination.

By Mr. Carey:
Q. Doctor, I would like to ask you to take a look at the other electrocardiograms taken by Dr. Woodford Troutman in Louisville, Kentucky, marked October 4, 1954, attached to his deposition.

Mr. Sams:
That is in evidence, too, by the way.

A. The tracing dated 10-4-54 appears within normal limits to me. It is different from the tracing taken in May of 1946. I would say there is nothing to suggest coronary disease in the tracing taken October of 1954.

Q. If there had been coronary disease in October of 1946, it would have been present in 1954, would it not?

A. No. That is not true. I can only reemphasize that I can take a tracing on you this minute that will be absolutely normal. You can walk over there and have a heart attack and drop dead. The tracing, per se, does not diagnose coronary disease.

Q. But it tells of the presence of a damage to the heart tissue, for example, does it not? Is that one of its functions?

A. That is why we use it. But there, again, one can have a severe myocardial infarction and have a normal tracing.

Q. Yes. But you find that the tracings of October 4, 1954, are entirely normal?

The Court:
He so said.

Mr. Carey:
That is correct.

The Witness:
Yes.

Mr. Carey:
That is all, Doctor.

Mr. Sams:
Thank you very much, Doctor. That is all I have.

The Court:
You may be excused.

(Whereupon, the witness was excused.)

The Court:
Call your next witness.

Thereupon, A. R. TAYLOR, was called as a witness on behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Sams:
Q. Would you state your name, please, sir.
A. Al Richard Taylor.
Q. Are you engaged in the practice of medicine?
A. I am.
Q. Where is that, Doctor?
A. Fort Lauderdale, Florida.
Q. Dr. Taylor, let me ask you, if you will, please, to speak just a little louder. It is a little difficult to hear, and the end juror will have a little trouble.
Doctor, are you engaged in any specialized field of medicine?
A. General surgery.
Q. What has been your educational qualifications to prepare you for that specialty?
A. I graduated in 1935. I then had approximately four and a half years of residency leading to general

surgery. That was in Baltimore and North Carolina, and the Army five and a half years, and I have practiced the rest of the time.

Q. I did not hear the last.

The Court:

He has been practicing ever since.

Doctor, let me suggest to you to speak out a little louder. Throw your voice a little bit more, because with these high ceilings, it is a little difficult for people to hear. I can hear, but back there it is a little difficult.

Q. Doctor, are you a member of any medical societies and associations in your local area or in the state or country?

A. Well, I belong to the AMA Broward County Medical Association, North Broward Hospital staff, Fellow of the American College of Surgeons, Southeastern Surgery and many others.

Q. Dr. Taylor, have you had occasion in your practice of general surgery to see or treat or examine the plaintiff, Dr. Edgar W. Stokes, who sits right here (indication)?

A. Yes, sir.

Q. Would you tell us when you first had occasion to see him.

A. I first saw Dr. Stokes March 1, 1952, in the hospital, North Broward Hospital.

Q. Doctor, would you describe to the jury, please, sir, what his condition was at the time you first saw him. Who called you?

A. I was called in to see Dr. Stokes by a local physician, primarily to determine whether he needed surgery after an accident. I suppose the accident occurred a day or two before, but I saw him the day after he had been in the hospital.

Q. Would you describe to us, then, what his condition was at the time you saw him.

A. Well, Dr. Stokes was bruised all over, more in some places, particularly the head, the arms, the lower trunk and the thighs, his shin, heel, and he was pretty black and blue all over and swollen.

Q. Doctor, did Dr. Stokes give you a history? Did you elicit from him a history as to how he received those injuries that you described?

A. Yes. I got a history from Dr. Stokes to the effect that he had truned his car over in a canal and was treated locally in a hospital, I believe on Route 27, and had managed to get into our hospital the following day or two by various ways.

Q. Doctor, I hand you a set of hospital records which have been marked Plaintiff's Exhibit #2 and ask you to look at those and tell us whether or not you recognize those hospital records.

A. Yes, sir.

Q. From where are those hospital records, Doctor?

A. The Broward General Hospital, Fort Lauderdale, Florida.

Q. Doctor, would you state for the jury from those hospital records whether or not you find anything in those records to show any head injury.

A. No. I have looked over these records at the hospital, and I was surprised that there was not more mention in detail about the multiple abrasions and contusions or bruises. But it covers the situation very briefly by contusions and multiple hematoma. That is blood clots.

Q. Doctor, do you have an independent recollection of having seen Dr. Stokes? Do you remember

seeing him? Can you recall the first time you saw him?

A. I remember seeing him very well the first time, yes.

Q. Will you tell us and the jury whether or not you saw any indication of any head injury.

A. Yes.

Q. That is from your independent recollection?

A. Yes. The forehead on the left side was discolored and bruised and swollen and maybe a little abrased. But it was pretty angry looking, that side of the face and head.

Q. Doctor, what was your diagnosis of Dr. Stokes' condition from your initial examination and from the history that you received from him at that time?

A. Well, I felt that he could have definitely had a severe accident as he quoted me, and he does not remember at all. He was unconscious, it seems, for minutes, and in his story, he didn't remember how he got out of the car and out of the water. But he managed in some way. It was rainy and a dark night, and he went—the last he remembers was when he was on the road and the car just left, and then he remembered being on the bank after that.

Q. What was your diagnosis of his condition, Doctor, based on your examination?

A. Well, shock, and the trouble in the legs, or the other bad bruises. It was the observation at that time to watch closely and decide as his progress would determine. But I would say shock and contusions, and from the head and his history of being unconscious, you would have to say concussion, brain concussion.

Mr. Carey:
I believe it states no diagnosis.

The Court:
Yes. He asked for diagnosis. You have your diagnosis there, have you not, Doctor?

The Witness:
Yes.

The Court:
He has his diagnosis in his hand.

Mr. Sams:
I think that is the hospital record.

Q. Do you have your initial diagrams, Doctor?
A. I have a lot of records in here, in the office, that are not in the hospital records.
Q. Refer to your office records, Doctor, and can you tell us from your office records what your initial diagnosis was?
A. Shock, contusion lower abdomen, thighs, legs, abrasions, multiple, thrombophlebitis, left, saphenous system, bilateral, deep saphenous veins—

Mr. Carey:
Just a moment, Doctor. I do not believe there is any question pending.

Mr. Sams:
All right. I will ask you another question.

The Court:
Do not volunteer.

Q. Do you have your report of December 10, 1954? Would you refer to your records and tell me whether you do or not.

The Court:

That is two years and a half after the accident. Is that right?

Mr. Sams:

Yes, sir, but in that he has a complete diagnosis, and I think it would be simpler to ask him about that than go through all his records. This is what he read from in a deposition.

Q. Do you have that with you, Doctor?

Mr. Carey:

I have to object to any conclusion drawn two and a half years afterwards.

The Court:

I do not think that would be pertinent to this accident. If you want to ask him what his condition was two and a half years after, it would be something else. But his diagnosis at the time of the accident, I think, would be pertinent.

The Witness:

If the Court will permit, I was called in consultation particularly with surgery in view, and the medical doctor would have treated the concussion as long as it was not surgery.

The Court:

I think he probably has that testimony.

Mr. Sams:
Judge, I missed that.

The Court:
I sustain the objection on the ground his diagnosis two and a half years later—

Mr. Sams:
But the letter written two and a half years later makes reference to the first visit that he ever made to the hospital. That is what he is talking about, and to all the things that he did all the way through.

The Court:
It would still be hearsay, in my opinion, as far as the diagnosis was concerned. A diagnosis is that which is made at the time.

Mr. Sams:
But this diagnosis that was written in 1954 was the diagnosis he made in 1952, and it is clear from the report.

The Court:
I think we have the diagnosis in 1952. If he has another diagnosis contradictory in 1954, let us bring it out.
What is the hospital diagnosis in 1952? You wrote a diagnosis on admission, did you not?

The Witness:
Yes, I wrote a diagnosis.

The Court:
What did you say?

The Witness:

It was not my chart. My opinion was a consultation.

The Court:

What did you say?

The Witness:

On the consultation sheet, I was concerned with the phlebitis, contusions, multiple hematoma.

The Court:

That is bruises and clots?

The Witness:

Yes. A contusion could be a concussion on the head.

The Court:

It could be.

The Witness:

It results in the brain shaking.

Mr. Carey:

I move that be stricken.

The Court:

All right. I will strike it.

Mr. Sams:

Judge, I do not want to argue this unduly, but I would like Your Honor—

The Court:
I am not going to take his two and a half year old letter into this record.

Mr. Sams:
But he wrote the letter himself.

The Court:
I do not care if he wrote it himself or I wrote it. It is still two and a half years after the accident. We want to know what diagnosis was made at the time. If he wants to change his opinion two and a half years—

Mr. Sams:
I am not trying to get him to change it. This is a concise statement.

The Court:
It is hearsay just as much as if I wrote it as far as what happened then.

Mr. Sams:
He was the one who examined him.

The Court:
He can testify as to what he found when he examined, but not going to—

Mr. Sams:
He cannot refer to any notes he made?

The Court:
No, sir, not two and a half years later.

Mr. Sams:

I am sorry, Judge. May I ask him to repeat—

The Court:

He can make his notes when a man comes to see him on a certain situation. That is admissible for certain reasons. After that, no. Those notes are no more admissible than if I made them.

Mr. Sams:

The time element being what makes them inadmissible?

The Court:

That is right.

Mr. Sams:

If that is Your Honor's ruling, I certainly do not quarrel with it.

The Court:

I want to explain to counsel so you realize there is a definite rule, in my opinion.

Mr. Sams:

All right, sir. I am not arguing with Your Honor.

The Court:

If you want to ask him what his condition was two and a half years later, that is fine.

Q. How long did you treat Dr. Stokes, over what period of time?

A. Well, I treated him all of the five days from the 29th to the 5th of March that he was in the

hospital. I observed him with reference to the possibility of emergency surgery because of blood clots. I didn't see the accident. I didn't see him in the other city.

Q. I understand that.

A. And I didn't know about the head injury except what I could see, because that was two, three days later that I saw him.

Q. I understand that, Doctor. That was the time you treated him over a five-day period?

A. That's right.

Q. For what reason was it that on December 10, 1954, you reduced to writing certain findings that you made two and a half years before? Why was the time interval in there?

A. Well, I believe it was because I asked for six-month evaluations, and it began to be needed more often than that. He wasn't progressing, or he was still in a condition that didn't seem like it was clearing up or he was getting well.

Mr. Carey:

I object to the question and move to strike the answer as to why he wrote some letter two years afterwards.

The Court:

I suppose the patient wanted it for certain purposes. Is that not true?

The Witness:

I will try to find that letter.

Mr. Carey:

It would be self-serving and hearsay. I think the inquiry is without foundation.

The Court:
Let us pass on.

Q. The diagnosis that you have given us, which was your initial diagnosis, was based on things you observed yourself on Dr. Stokes at that time?
A. That's right.

Mr. Sams:
Is it my understanding you objected to it? I do not know whether it was sustained or not.

Q. Did you diagnose a brain concussion?
A. I have in writing here on December 10, 1954—

Mr. Carey:
Just a moment.

The Court:
We will strike that. Answer the question yes or no. You should answer that question.

Mr. Sams:
Do not refer to anything after that.

The Court:
You take that letter of 1954 and just cover it up. Let us not hear any more about it.
Go on and ask any questions you want.

Q. It is my understanding you elicited a history of unconsciousness?
A. I beg your pardon.
Q. You elicited a history of unconsciousness?

Mr. Carey:
That is objected to as leading, if the Court please.

The Court:
He already stated that. That is repetitious. I will sustain the objection. He said he was unconscious, and if you are unconscious, you have a slight concussion.

Mr. Sams:
What I was trying to get at is this—

The Court:
Is that correct, sir?

The Witness:
Yes, sir, that is correct.

The Court:
If you get knocked out in a prize fight or anything, you have a slight concussion.

Q. You also found contusions and bruises on the forehead?
A. Yes.
Q. Doctor, have you had occasion to see and treat or examine Dr. Stokes since he was released from the hospital?
A. Yes. I have seen him several times each year.
Q. What was the occasion for that? Was that for treatment?

Mr. Carey:
That is objected to as leading, if the Court please.

The Court:

That is overruled, because that part of it is quite all right.

A. Yes, sir, that was for treatment. He is still worried about those veins in the leg, and he still believes by tomorrow one of them will break or give him trouble. He is still worried about his headaches, so he comes to see me when he comes to town.

Q. Dr. Taylor, based on your examinations of Dr. Stokes, your original examination, the course of treatment and all the subsequent examinations that you have made, have you arrived at an opinion as to whether or not Dr. Stokes is suffering from any disability?

Mr. Carey:

If the Court please, there is no relation here of time. We do not even know when the last time was.

Mr. Sams:

I will tie that down.

Q. Do you presently have any opinion as to whether or not Dr. Stokes is suffering from any disability; that is, at the present time?

A. Yes, I have an opinion.

Q. Would you state to this jury whether or not in your opinion at the present time he is or is not disabled?

A. I would say he is disabled.

Mr. Carey:

I object to the question as I objected previously.

The Court:

For the same reason I will overrule the objection and reserve the right for you to move to strike in case it is not connected.

Q. Dr. Taylor, will you state for us, please, to what extent in your opinion is he disabled?

A. He is disabled permanently to practice medicine, in my opinion. I don't know about other things.

Q. What do you mean you do not know about other things? Can you be more specific?

Mr. Carey:

I wish to make a further objection to this question as well as the previous question. Those questions are put to the doctor as to whether he is disabled, which invades the province of the jury. That is the reason they are here.

The Court:

But the doctor has an opinion, and they can resolve that problem as we go along. Counsel is developing now the various disability that might occur.

Q. Could you be more specific in saying in your opinion he is disabled from the practice of medicine, but you do not know about other things?

A. Well, medicine is too serious a profession for a man that is confused or anxious or emotionally unstable to try to follow.

Q. Would you tell us what the factors are that you take into consideration in arriving at your conclusion or opinion that Dr. Stokes is disabled.

A. It has been four years of observation. I have seen him lots of times in those four years.

Q. I mean the symptoms, Doctor.

A. Well, there are a lot of subjective symptoms, plenty of them, and they are just as real to him, I suppose. The pains we have to check—in other words, that is hard. But knowing the objective things that I watched and observed from the very beginning, and the changes, I feel like some of that would be objective.

Mr. Sams:

I believe that is all I have.

The Court:

Counselor, I did not mean to shut you off from asking him about the condition at any time.

Mr. Sams:

No, sir.

The Court:

When he made a revised estimate of his injuries at any other time. I did shut you off because that is not the usual course.

Mr. Sams:

I thought he distinctly stated them.

The Court:

I do not want you to be misled.

Mr. Sams:

No, sir. I appreciate that.

Mr. Carey:

I wish to move to strike the testimony with respect to the doctor's opinion as to disability, as well as the testimony of Dr. Dornberger.

The Court:

I think the testimony has value. It does not cover the whole field of the question in this case, but it covers part of the field.

Mr. Carey:

Very well, sir.

Cross Examination.

By Mr. Carey:

Q. Doctor, your first visit to this man was on March 1, 1952?

A. Yes, sir.

Q. I wonder if you would take a look at your notes and see if that first visit was not March 4, 1952.

A. Well, the date could be wrong. I have it March 1 on the consultation sheet from the hospital records. It could have been the 4th, but if I remember, I believe it was March 1.

Mr. Carey:

I would like this marked for identification.

The Court:

Defendant's Exhibit #1 for identification.

(The document referred to was marked for identification as Defendant's Exhibit #1.)

Mr. Carey:
I would like this marked for identification.

The Court:
Defendant's Exhibit #2 for identification.

(The document referred to was marked for identification as Defendant's Exhibit #2.)

Q. From your notes you believe it was March 1 rather than March 4, 1952?

A. It may be on the nurses' notes. That will be specific. Let us see if it is.

March 1, the nurse wrote "Dr. Taylor here."

Q. Now, Doctor, were you Dr. Stokes' attending physician, or was Dr. R. J. Patterson?

A. Dr. Patterson, in Hollywood.

Q. Is Dr. Patterson a surgeon or general practitioner?

A. General practitioner.

Q. You examined this man for his injuries at the hospital, did you not?

A. Yes, sir.

Q. Your diagnosis at the time was that of shock, contusions of the lower abdomen, thighs and legs and abrasions, multiple, and thrombophlebitis, left saphenous system; bilateral, and deep saphenous veins. Is that correct?

A. That's right.

Q. You did not diagnose his condition as incorporating or having or including a concussion, did you, Doctor?

A. I didn't see him with one, no. I saw him two or three days after the accident.

Q. There is no mention in the hospital records anywhere of any injury to his head or any bruise to his forehead, is there, Doctor?

A. Except included under the multiple, when they were not specific. He had bruises over so much of his body, that we made it a general term.

Q. There is no mention in the hospital of any suggestion of a concussion in the hospital records, is there?

A. I don't think so. I looked for it and didn't see it.

Q. The chief complaints as shown in the hospital record—do you have a copy there with you, sir?

A. This is Dr. Patterson's chart.

Q. Yes, sir.

The chief complaints there were that he was in an auto wreck twenty-four hours prior to admission, struck across the lower abdomen and upper thighs, probably by steering wheel. Is that not right, sir?

A. Yes, sir, that is correct. That is what is on here.

Q. Is this your signature on the face sheet of the record above Dr. Patterson's, or is that just printed in?

A. It does not look like my writing. The record room could put that in.

Q. I do not think it looks like your writing either.

A. It is better than mine.

Q. I show you Defendant's Exhibit #1 for identification, being a report submitted, and ask you if that is your signature.

A. That is my authorized signature, the office girl. You will probably find about the same one on all of these.

Q. Yes, sir.

I show you now Defendant's Exhibit #2 for identification and ask you if that is your signature at the bottom.

A. Yes. That is the authorized one.

Q. Is it your signature?

A. No, sir.

Q. You, however, made up or approved both of these forms as being your diagnosis, and the report to the insurance company of the condition of this man, Dr. Stokes, did you not?

A. I will have to say yes to that.

Q. I will ask you to read the diagnosis. We will not take up the jury's time unnecessarily. Does that diagnosis there include anywhere any mention of a concussion?

A. No, sir.

Q. On either of those forms?

A. No, sir.

Q. One of the forms is dated August 26, and the other appears to be November 17. This accident happened in February of 1952.

A. It summarizes it there because I believed it.

Q. These were your summaries, were they not, of this man's condition?

A. No. That is very brief.

Q. If a concussion was sustained by this man, that would probably be as serious as any part of the injuries that were sustained, would it not?

A. That would be probably the worst, but the emergency part was the blood clot.

Q. You certainly would show to the insurance company the worst part of his injuries, would you not? You would not leave it out?

A. Well, you are making me the attending physician. I was consulted.

Q. Sir, these are forms signed by you or containing your authorized signature, are they not?

A. That's right, yes, sir.

Q. They would include the more serious of the man's injuries, would they not?

A. They should, yes.

Q. The first one on August 26, 1952—

The Court:

They will speak for themselves.

Mr. Carey:

All right, sir.

The Court:

Unless you want to offer them out of turn and counsel is agreeable.

Mr. Sams:

It is all right with me.

Mr. Carey:

I am willing to have them go in without prejudice to my position on any motion I may make.

The Court:

Do you want to offer them out of turn?

Mr. Carey:

If that is agreeable without any prejudice.

Mr. Sams:

I have no objection to putting them in in either his case or mine. I have not seen them.

The Court:
They will be admitted.

(The documents referred to were received in evidence as Plaintiff's Exhibits #10 and #11, respectively.)

Q. Doctor, you discharged Dr. Stokes on September 10, 1952, did you not?

A. That was the first date I anticipated we could make an evaluation on the maximum benefits which should be reached, but it does not always work out that way.

Q. Doctor, this form is dated November 17. It is stamped as received by the company December 23, 1952. So, it relates back. In other words, it was telling about something that had already happened. Does it not say under Paragraph 10, "Patient was discharged from treatment here and returned home September 10, 1952. At that time progress was good and satisfactory." Is that correct, sir?

A. That is all correct. It could be reopened, probably, and it seemed to me it never has been closed, actually, because I have been seeing him ever since.

Q. I am not asking you to argue the case. I am asking if you did not discharge him September 10, 1952.

A. I wrote it down that way.

Q. You did discharge him on that date, did you not?

A. You can't make it cut and dried like that.

The Court:
What he means, Doctor, is did you discharge him at that time?

The Witness:
Yes, sir.

The Court:
You could change your mind later on.
He answered the question.

Mr. Carey:
Thank you.

Q. I take it, Doctor, that your opinion that this man is disabled is then based entirely on what you have related as being subjective complaints, that is, his mental outlook and his coming in being worried about his phlebitis, if there is one, and that sort of thing. Is that right?

A. Well, the word "entirely," is a big word. I don't like to agree or disagree with that word, because there are some objective things.

Q. Would you not say, Doctor, that the pendency of claims, four or five of them, with different companies, would have a direct bearing on his outlook in that respect?

Mr. Sams:
Your Honor, I would like to object.

The Court:
Do not go into that. You can ask him about the pendency of litigation and claims. The jury will ignore any statement that there are a number of companies involved in any claim. I am sure counsel inadvertently said that.

Q. Doctor, would not the pendency of a claim against the company with respect to the very thing

we are talking about, as to whether he is disabled or not, the pendency of litigation, would that not have a direct bearing on the mental outlook of the patient?

A. I don't think my opinion would be worth anything on that.

The Court:

In other words, you are unable to answer that?

The Witness:

That's right.

Q. Have you, Doctor, observed patients preparatory to litigation in their nervous state and a state of suspense in connection with their injuries, who have had a very appreciable degree of recovery after the litigation is over? I mean sincerely—

A. Yes, sir, I have, both ways. I have been right sometimes and wrong sometimes.

Q. That is right, sir.

Then it would be a factor, would it not, in considering the mental outlook of the person as to whether litigation was pending or not?

Mr. Sams:

I object to the question on the ground that the doctor already stated he is not capable of answering it. He is not qualified to answer.

The Court:

He said he does not think he is qualified, but he has answered just generally speaking. I presume he is answering like a layman would answer. He is not betting his professional reputation on that.

Q. Have you taken into consideration, Doctor, too, that this man has been a practicing psychiatrist for a number of years and would know what symptoms to elicit if he wished to be that kind of a person?

A. No, sir. I didn't take that into consideration.

Q. How long had you known this man?

A. I met him in the hospital.

Q. You had never known him before 1952, then, had you, sir?

A. No, sir.

Mr. Carey:

That is all, sir.

The Court:

Any questions?

Mr. Sams:

I would like again to reoffer in light of putting in evidence the two reports to the company the complete diagnosis by Dr. Taylor in his report of 1954.

The Court:

To the company?

Mr. Sams:

I do not know to whom it was.

Mr. Carey:

I object.

The Court:

It would have no bearing here. You can ask him what his condition was in 1954, if you like.

Mr. Carey:
It has not changed his diagnosis.

The Court:
Ask him if he changed his diagnosis.

Mr. Sams:
No, sir, he has not. But he asked him the question in introducing the forms whether or not it showed anything about concussion.

The Court:
Ask him his appraisal of the man's condition at the time or at any subsequent time.

Mr. Sams:
I do not think it would be objectionable in light of the introduction.

Re-Direct Examination.

By Mr. Sams:
Q. Doctor, have you rendered a report subsequent to the two reports which Mr. Carey showed you in which you have showed a brain concussion in your report?

Mr. Carey:
That is objected to as hearsay.

The Court:
I will sustain the objection on the ground it is leading.
Have you made a further examination of the doctor since you made these two reports?

The Witness:
Yes, sir.

Q. In the subsequent examination was your diagnosis different than the diagnosis made in the two reports that Mr. Carey showed you where you did not show a concussion?

A. Would it be wrong for me to bring it up to date and make the diagnosis and things I think and thought, and still think, Dr. Stokes has?

Q. Would you do that. You do not even have to refer to any notes. Do it for us from your own independent recollection of what you saw at the time. Tell us just what your initial diagnosis was and what your diagnosis is now.

A. You have the initial diagnosis.

Q. What is the diagnosis today?

A. The diagnosis today would be multiple contusions forehead, left side of face, arms, pit of the stomach or epigastric, lower abdomen, thighs, right shin, right heel, shock, phlebitis, bilateral saphenous and greater saphenous veins, possible brain concussion, moderately severe.

Mr. Carey:
I move that be stricken, if the Court please, "possible concussion," unless he testifies that his diagnosis is with reasonable medical certainty.

The Court:
That is all right from a diagnosis. It may be or may not be so, but there is some indication that it might be. Is that right?

The Witness:

Yes, sir. I wasn't there, as I told the Court before, and the symptoms afterward could have been from shock or from concussion or from other things. I wouldn't be able to say concussion. I could have if I would have been at Moore Haven.

The Court:

Phlebitis was an antecedent condition in this particular matter?

The Witness:

The result of an accident?

Q. Was it the result of an accident or a result of something that happened before the accident?

The Witness:

It was present when I saw him, so I can say—

The Court:

It was not the result of an accident, though, as far as you know?

The Witness:

Well, the thrombophlebitis must have been because of all the swelling and discoloration; that is, blood clots in the veins.

The Court:

Yes. Does that still persist? Is that still present?

The Witness:

Yes, sir. No. It is cleared up.

The Court:
Cleared up?

The Witness:
Yes.

Q. How large was the bruised area on the head about which you have spoken?
A. The outer forehead and left cheek and the eye.
Q. Can you put your hand to the area where it was?
A. Yes (indicating).
Q. How far did that extend over?
A. It went back toward the ear. But it was evidently something he contacted on the forehead.

Mr. Sams:
I believe that is all.

Re-Cross Examination.

By Mr. Carey:
Q. Doctor, when was the first time you ever gave a diagnosis of concussion or mentioned anywhere about this bruise on the head?

The Court:
Wait a minute. You had your cross examination. If you want to object to anything new which he has brought out—

Mr. Carey:
He now gives a new diagnosis and states he changed his mind as to possible concussion in his original diagnosis. That original diagnosis did not include that. I want to know why he changed his mind.

The Court:

You can ask him that question.

The Witness:

I said multiple contusions and multiple hematoma. That answers the question.

Q. My question is, Doctor, when was the first time you mentioned to anyone in writing or otherwise that this was an injury to the head and possible concussion of the brain?

A. Not the word "concussion," but I did mention multiple contusions.

The Court:

I take it, Doctor, it was December of 1954.

The Witness:

March, 1952. Yes, December 10, 1954. Probably that was it.

Q. That would be your answer, the first time you did mention it?

A. The first time I have it in writing; not the first time I said it.

Q. The first time you ever made any report of it?

A. Yes, I suppose.

Q. You were with this man's attending physician?

A. Dr. Patterson, while he was in Hollywood. Then he moved to Fort Lauderdale, and I followed the case.

Q. He asked you to make out a number of reports, did he not, with respect to his condition?

A. Yes, sir.

Q. You knew he was contending he was totally and permanently disabled as a result of this accident, did you not?

A. Well, I thought so.

Q. You knew he was contending so, did you not, and was seeking benefits for it?

A. For the time until he got well, yes.

Q. Through all of these first reports you made no mention of a concussion of the brain?

A. No.

Mr. Carey:

That is all.

Mr. Sams:

I have something right on that.

The Court:

That is the evil of it. From now on, there will be direct, cross and redirect. You both object if the man gets out on his particular side of the fence.

Mr. Sams:

I am perfectly willing to do that, but he came back and asked him some specific questions, and I would like to question him again.

Re-Direct Examination.

By Mr. Sams:

Q. Doctor, were you asked in 1954 to write a written review of everything in this particular case?

A. It sounds like that.

Mr. Carey:

I object, if the Court please.

The Court:

It is immaterial. I will sustain it.

Mr. Sams:

Judge, may I say just one thing. He asked a question as to the first time he ever said he had a concussion, trying to show that he never said it before. The doctor said it in writing in 1954.

The Court:

The doctor answered that the best knowledge he put it in writing was that date. I asked the question.

Mr. Sams:

I want to show why he did at that particular time.

The Court:

Does that have anything to do with this lawsuit? It is immaterial.

Mr. Sams:

All right. I have no further questions.

The Court:

The thing is what is wrong with this man? That is material.

Mr. Sams:

He already stated that. That is all, Doctor.

(Whereupon, the witness was excused.)

Mr. Sams:

Before we call the next witness, I would like to argue to Your Honor about this.

The Court:

The jury will be excused.

(Whereupon, the jury withdrew from the Courtroom.)

Mr. Sams:

Judge, the next witness we are going to call or would like to call would be Dr. LeDrew. We do not want to call Dr. LeDrew as our witness. Some of the things he will say will be things we need to develop in our case. We would like to call him under the federal rule that allows us to call a hostile or adverse party, hostile witness or adverse party.

I appreciate that the general rule is that you call a witness, and if he develops as a hostile witness, then you can call him as a hostile witness. If it does not happen to develop that way, you must just be stuck with his testimony.

The Court:

We do not want to do that in advance.

Mr. Sams:

But under certain circumstances, the Courts have allowed calling witnesses as hostile witnesses where it is obvious.

Dr. LeDrew examined Dr. Stokes as the examining physician for the Continental Casualty Company under the terms of the policy. That alone does not make him hostile.

We took his deposition, and the deposition itself is quite lengthy. In the deposition it was developed that Dr. LeDrew's initial diagnosis had been one thing, but it had changed because of his own personal opinion about certain things Mr. Carey told him prior to the deposition, such as the fact that Dr. Stokes was

attempting to collect a certain amount of insurance and so forth and so on, which would indicate he was hostile to our position.

During the course of the deposition, this interrogation took place, and Dr. I. Drew testified as follows: I asked him to read—

Mr. Carey:

What page?

Mr. Sams:

Page 36.

I asked Dr. LeDrew to read certain documents to me that he had in his file. He said, "You would not be able to read them."

Then, apparently, there was some off-the-record discussion between counsel and Mr. Sams.

By Mr. Sams: "Do you have any objection to his doing that?"

Then Mr. Carey: "Yes, I object to it."

Then the witness said, "I must be guided by Mr. Purtell, I suppose."

Mr. Purtell was an agent for the company.

The witness said, "You represent Mr. Purtell, do you not?" He was addressing his remarks to Mr. Carey. Mr. Carey said, "I represent the Continental Casualty Company, the company involved."

I said, "He does not represent you, does he, Doctor?"

The doctor answered, "He was the one that employed me."

Then the following was the testimony:

"Question: In other words—"

I never finished it. The doctor said, "I feel I should be loyal to the person employing me."

"Question: Is that correct?

"Answer: That is correct.

"Question: You are supposed—

"Answer: Is that proper procedure, being loyal to the person who employed you?

"Question: I should like to see them, but it is all right, Doctor." I said something of that nature.

Dr. LeDrew's attitude in this whole deposition was one of hostility all the way through. He would not read records. He did turn it over to us along with some notes Mr. Carey had given him prior to the taking of the deposition.

I think just from that alone there is no question that Dr. LeDrew is a hostile witness.

There is also no question that some of Dr. LeDrew's testimony will be helpful, at least helpful in developing the facts of the case. I request the Court to allow me to call Dr. LeDrew as a hostile witness or, if the Court does not feel it can do that, because of the importance of this, to call Dr. LeDrew as the Court's witness and allow me to cross examine him.

The Court:

I cannot call him as a hostile witness, and I am not yet prepared to call him as a Court's witness. He may develop hostility.

Mr. Carey:

This was with respect to whether he should produce certain documents, Your Honor.

The Court:

I have seen him on the stand in other matters, and I am pretty sure he is a careful fellow.

Mr. Sams:
There is no question about that.

The Court:
I do not think he would testify one way or the other.

Mr. Sams:
I have an important decision to make. May I ask Mr. Carey to tell me whether or not he is going to call Dr. LeDrew.

Mr. Carey:
I do not think I am obliged to say so at this stage.

Mr. Sams:
I would request that in fairness.

The Court:
Yes. I think we should exchange witnesses. Do you intend to call him?

Mr. Carey:
I do not intend to call him, Your Honor.

Mr. Sams:
Then I will have to call him.

The Court:
I do not think the fact that a man testifies in your favor and then against you is injurious to your case. That is a good deal like life.

Mr. Sams:
I would agree with that a hundred per cent if it were not for the fact—

The Court:
If he becomes hostile, you can then move that he become a Court's witness and proceed as a hostile witness.

Mr. Carey:
I might say he was asked to make an examination of this man for Continental Casualty Company, not for Continental Assurance Company, the company that is the defendant in this lawsuit.

The Court:
They are sister companies.

Mr. Carey:
Yes, affiliated.

Mr. Sams:
I disagree with that. I have some letters addressed to me—

The Court:
I say, Mr. Sams, it would not make any difference.

Mr. Sams:
I have a letter from Mr. Purtell telling me to get in touch with Dr. Stokes.

The Court:
Counsel agrees that they are related companies.

Mr. Sams:
I did not give it any thought at the time.

Mr. Carey:

While the jury is out, Your Honor, I should like to again ask that the Court strike the testimony of Dr. Taylor and the previous doctor, Dr. Dornberger, with respect to the disability of the plaintiff.

In the first place, it was not brought out wherein the disability lie; that is, what the source of the disability was.

In the second place, it was not brought out with any degree of certainty what they meant he was disabled from doing. Thirdly, it was not specified as to when any such disability, if any, began and when it ceased. The question was merely as to whether he is now disabled.

The Court:

I think their testimony, like all other testimony, is not complete. But it is testimony upon which you can base a conclusion. One of them said he is certainly disabled from the practice of medicine and probably not other things. The other said he is completely disabled.

Mr. Carey:

That does not give us any basis with respect to whether these people are to make a finding as to this lawsuit.

The Court:

Counselor, that is up to you whether they make a finding. That is evidence that would add up with other evidence, perhaps, that would permit them to make a finding, after they listen to your witnesses.

Mr. Carey:

May I just make one observation?

The Court:
And your very capable argument.

Mr. Carey:
This action, Judge, is for indemnity which is now accrued, not to determine whether he is disabled or not. It is to determine whether during the months since September, 1952, he was disabled.

The Court:
He kept coming in frequently. He had heart pains. That is actually what they testified, as near as I can understand, and he has a fear complex which is serious. That would be my impression if I were a juror.

Mr. Carey:
My point is that it is his present condition they delved into and not to the period of time during which the jury has to make a finding.

The Court:
No. Find out what they said when he came in. For instance, one of them said he is not disabled. Both tell about him coming in frequently and complaining of all sorts of things.

Mr. Carey:
The testimony with respect to disability is not whether he was disabled since September, 1952.

The Court:
Disability is not always by conclusion, but by facts. The man is unable to work because he could not walk. You would not need any disability to say that he could not pursue an active occupation. You

just have testimony he was unable to walk. If these people say this man is obsessed with a great fear he is going to die, that he has a lot of ailments and is very nervous, that might be grounds for a jury to say that he has been disabled. It might also be grounds, on the other hand, to say that he just suffers from a fear complex and would be cured if he did not have these insurance companies on his neck.

Mr. Carey:

Or if he was not trying to get at the insurance companies unjustly.

The Court:

It works both ways.

Let us not go into hat.

Mr. Carey:

I think it is also grounds for a directed verdict.

The Court:

It might be.

Mr. Sams:

Judge, Mr. Carey stated to me at noontime, and I was in agreement, that we might request that we adjourn a half hour early today. I think we can finish some time tomorrow.

The Court:

We will adjourn at five o'clock. Will that suit you?

Mr. Carey:

That will help, Judge.

The Court:

Try to get the matters real concise tomorrow. You do not gain anything by going into too great detail.

This is a simple case, whether this man is suffering from a disability that removes him from the field of his ordinary endeavor, and a doctor ought to be able to testify to that almost bang, bang, bang.

Mr. Sams:

This next doctor may be a little more difficult on that score.

(Whereupon, the jury returned to the Courtroom.)

The Court:

Do you each waive the polling of the jury and consent they are present?

Mr. Sams:

Yes, sir.

Mr. Carey:

Yes, sir.

The Court:

You may proceed.

Mr. Sams:

The next witness the plaintiff will call will be Dr. Frederick LeDrew.

Thereupon, FREDERICK LeDREW, was called as a witness on behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Sams:

Q. Dr. LeDrew, I might ask you, please, to speak as loudly as you can, because it is sometimes difficult to hear.

Would you state your name.

A. Frederick LeDrew, L-e-D-r-e-w.

Q. Doctor, are you engaged in the practice of medicine in Dade County, Florida?

A. Yes, sir.

Q. What address?

A. At 411 Huntington Building, Miami.

Q. That is Miami, Florida?

A. Yes.

Q. Doctor, are you engaged in any specialized field in the practice of medicine?

A. Yes. I specialize in the field of psychiatry.

Q. Would you tell us just briefly what your educational qualifications have been to prepare you for that specialty.

A. Well, I graduated in 1919 with a B.A. degree; secured an M.A. degree in 1920 and an M.D. degree in 1926.

I became a Diplomate of the American Board of Psychiatry and Neurology in 1934.

During the war, I was a lieutenant colonel in charge of the neuro-psychiatric section at the First Air Force.

I am at present one of the clinical professors of psychiatry at the University of Miami Medical School.

Q. I presume, Doctor, that you are a member of the staff of majority of the hospitals here in Dade County?

A. Yes, sir, I am.

Q. Doctor, did you have an occasion to examine Dr. Edgar W. Stokes, who is sitting right here, the plaintiff?

A. Yes, sir, I did.

Q. Dr. LeDrew, who employed you to make that examination?

A. May I refer to my notes, sir?

The Court:

Yes, to refresh your memory, you may do so.

Q. If you would just answer my specific questions.

The Court:

Who employed you?

Q. Who employed you to make that examination?

A. The insurance company.

Q. Was that the Continental Assurance Company?

A. That was the Continental Casualty Company.

Q. Did Dr. Stokes come over to your office for an examination?

A. Yes, sir.

Q. How many times did you see Dr. Stokes?

A. Just once.

Q. At the conclusion of your examination, did you render a report to the insurance company?

A. Yes, sir, I did.

Q. Dr. LeDrew, I will just ask you this one question: Did you report to the insurance company at

that time that in your opinion Dr. Stokes was disabled from working?

A. I believe I said at that time that in my opinion he was unable to work, at the time I examined him.

Q. You have never examined him subsequent to that time, have you, Doctor?

A. No, sir, I have not.

Mr. Sams:

That is all I have.

Cross Examination.

By Mr. Carey:

Q. The only examination you had of this man, Doctor, was when?

A. Was October 21, 1953.

Q. How long did you examine him, sir?

A. About an hour, a little more.

Q. You based your diagnosis on the history that he himself gave you?

A. I based my diagnosis on the history, my medical examination and, I believe, I secured Dr. Keedy's, the neuro-surgeon's, notes.

Q. Those showed that his neurological examinations were negative, did they not?

A. I just forgot what the notes said, but I believe the diagnosis made by Dr. Keedy was cerebral concussion.

Q. Sir, will you refer to your notes on that—

Mr. Sams:

Wait a minute. I object to Mr. Carey arguing with the witness about Dr. Keedy.

The Court:
Sustain the objection.

Mr. Carey:
I ask that that portion be stricken from the answer, if the Court please.

The Court:
No. I will admit it.
Please refer to your notes and see if that is what Dr. Keedy reported.

The Witness:
I notice here that the notes I made were that Dr. Keedy saw Dr. Stokes January 13, 1953.

Mr. Carey:
Just a moment, please. If the Court please, I move to strike any portion of this doctor's opinion which is based upon something that another doctor stated, who is available in this city and can testify if he were here, it being hearsay. This doctor examined the patient and should come up with his own conclusion with respect to his own examination.

Mr. Sams:
I will stipulate that is all right. I objected to that before.

The Court:
All right. All testimony about what Dr. Keedy stated will be stricken, and the jury will disregard it.

Q. Your contact with this man, Doctor, was confined to about a one-hour examination?

A. About that.

Q. And the history which you got from him was to the effect that he had had a concussion?

Mr. Sams:
I object to that, if Your Honor please.

Mr. Carey:
I will withdraw the question.

Q. You had not ever known him personally or known personally about his background before seeing him on that date, did you, Doctor?

A. No, sir.

Q. You have not known him personally or seen him or had occasion to observe him since that one-hour examination on that day in 1953, have you, Doctor?

A. No, sir.

Mr. Carey:
I believe that is all, sir.

Mr. Sams:
No further questions.

The Court:
You may come down.

A Juror:
Could I ask Dr. LeDrew a question?

The Court:
No, you better not. You may request the Court in the absence of the witness.

Mr. Sams:
That is all, Doctor.

Mr. Carey:
Just one more question.

Mr. Sams:
I object to any further examination, if the Court please.

The Court:
If he has one question, let him ask it.

(By Mr. Carey Continued):
Q. Do you feel that you needed a complete social history in order to complete your diagnosis on this case, Doctor?
A. Yes, sir. My diagnosis, of course, during the first examination is tentative, and study and information and examination could change the tentative diagnosis to what we call a final diagnosis.
Q. Your diagnosis, then, I take it, was not a final diagnosis?
A. No, sir.

Mr. Carey:
That is all.

The Court:
That is all?

Mr. Sams:
Just a minute, Doctor.

The Court:
Wait a minute I am sorry.

Mr. Sams:
I have just a few questions.

Re-Direct Examination.

By Mr. Sams:
Q. You did not submit any report to me on this, did you, sir? That was the report you submitted to the insurance company?
A. I submitted my—

Mr. Carey:
I object to that being immaterial.

The Court:
Sustain the objection.
Q. Did the insurance company ever make any effort to get Dr. Stokes back for any further examination?

Mr. Carey:
I object to that.

Mr. Sams:
I will withdraw the question.

The Court:
I think so.
You may come down.
(Whereupon, the witness was excused.)

Mr. Sams:

As the next witness, we will call Dr. Stokes, the plaintiff.

The Court:

I want to explain to the members of the jury that questions are not permitted by jurors for the reason that they might ask a question that would not be proper in law. It might be a very proper question and probably would be in order, but it might be embarrassing to counsel and they would not object to it or make any effort to stop the answer. Do you understand? This is a business in which you have to proceed according to the fixed rules. Otherwise, all sorts of things might happen.

Thereupon, EDGAR W. STOKES, was called as a witness in his own behalf and, after having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Sams:

Q. Will you state your name, please, sir.

A. Edgar W. Stokes.

Q. Dr. Stokes, you have been sitting here and realize the difficulty in hearing in this Courtroom. I am going to ask you to speak as loudly as you can, because these jurors want to hear what you have to say.

What is your address?

A. 1300 Southeast First Street, Fort Lauderdale.

Q. How hong have you resided there?

A. Well, since 1945 that has been my home. But I have lived in the north until I came down in 1952 or 1951.

Q. What has been your business or occupation throughout your lifetime?

A. I was the medical director of a private psychiatric hospital.

Q. Where were you born, Dr. Stokes?

A. Louisville, Kentucky.

Q. What year?

A. '98.

Q. Where did you go to school?

A. I went to Vanderbilt, the University of Louisville, and the University of Tennessee.

Q. When did you graduate from medical school?

A. In 1924.

Q. Then what did you do?

A. I took over the operation of my father's sanitorium, because he died. He was a physician and a psychiatrist.

Q. Where was that?

A. In Louisville, Kentucky.

Q. What was the name of that sanitorium?

A. Stokes.

Q. Stokes' Sanitorium?

A. Stokes' Sanitorium.

Q. How long did you operate that sanitorium?

A. I operated it for approximately twenty-seven years.

Q. What was the general nature of the medical treatment given at that sanitorium?

A. I treated alcoholics, drug addicts, nervous patients, mental patients and senile cases.

Q. Doctor, when you came to Florida, what year was that?

A. Well, I came down to Florida in 1951, after I sold my hospital. I don't remember exactly when that was at this time. But I came down at that time to establish my residence here.

Q. What was the purpose? What was the reason for your selling your sanitorium and, first, when did you sell your sanitorium?

A. I sold my sanitorium in the fall of 1950 to the Eastern Star, which is a Masonic order, and they gave me whatever time I wanted to wind up my business, and I was able to do that, I think, April of 1951.

Q. What was the reason for your selling your sanitorium, Dr. Stokes?

A. I had had this coronary condition in 1946. I didn't want to make it generally known because I knew it would affect my business. So I cut down on certain types of patients that were a great strain on me.

Another reason I was selling it is that since 1933 I had had essential hematuria, and whenever I got under a strain with a bad patient or had a patient in a critical condition, where I had to be up with them night and day for a period of time, I would have a return of this bleeding from my kidneys, which was diagnosed by Dr. Hugh Young at Johns Hopkins University, and also by local doctors there in Louisville. My records—I have none, because they were turned over to the Continental Assurance Company at that time.

Q. Doctor, I just asked you why you sold your sanitorium.

Now, when you came to Florida, what was the purpose of your coming to Florida?

A. Well, about 1950, I had talked to Commissioner Gallion in Fort Lauderdale, and he told me he

thought by 1952 there would be a position available in mental hygiene.

Mr. Carey:

I object to that.

The Court:

Yes. Do not state what somebody else told you. You came here for what purpose?

The Witness:

For the purpose of engaging in mental hygiene.

Q. Is that a field of the practice of medicine?

A. That is a field of the practice of medicine in which a person qualified as a psychiatrist could enter.

Q. Had you had some offer of a position in that field here in Broward County?

A. Yes, I had.

Q. Did you go into the field of mental hygiene?

A. No, I didn't, because of the fact that I wanted to determine exactly when the position would be available and take some post-graduate work. I came down here in 1952 to see about that, and that's when I had my accident.

Q. Describe to us, Doctor, as best you can what happened in this accident.

A. Well, the accident occurred about six-thirty in the evening, in which I ran into one of those flash storms. I mean, the rain was so heavy that I had to put up all my windows, and I had to slow down in my speed. It was very cold at that time, and I was approaching a bridge that had about a right-hand angle turn and, as I approached that bridge, I saw my light out in the field where I had been travelling for

a long time on a straight road. I thought I was going to run into a canal. As I came around the turn, another car was coming toward me, and the lights kind of blinded me, and I got panicky and put on my brakes, and when I put on my brakes, I skidded off the road. It was a new macadam road that was covered with crushed rock and tar, and I went about one hundred fifty feet or two hundred feet, I don't remember exactly, and I looked up in front of me and saw a post, and somebody said to me if you hit that post, it will kill you, and I put on my brakes.

Mr. Carey:

If the Court please, I object to this portion of the answer.

The Court:

Yes. Everybody is interested in knowing the reactions. Be a little more concise about what happened.

Q. Try to restrict your answers just to the facts.

A. I put on my brakes, and I remember turning over three times, and when I came to, I was laying in a canal full of water, and I thought I was still in the bottom of the car. I thought that my time was up, and much to my surprise, I rose up and was only in about four feet of water, and I walked to the bank.

You don't want any details about what happened after that?

Q. Just this much, Doctor: Were you taken from there to a hospital?

A. The police car took me to an inn, the Clewiston Inn.

Q. Clewiston Inn?

A. That's right.

Q. What was done for you there?

A. There was nothing done for me except that they gave me a room.

Q. What was your condition at that time, Doctor?

A. Well, when I got in my room, I don't remember exactly what time it was, eleven or twelve o'clock, I was so stimulated, I couldn't sleep. I guess I slept about a half hour or an hour altogether that night, and I had in my grip some penicillin, and I didn't know how badly I was hurt, but I was thinking if I took penicillin, it would sterilize my blood and keep me from having a blood clot.

I started at twelve o'clock that night taking penicillin about every six hours.

Q. For how long did you administer this treatment to yourself?

A. Well, I administered it to myself until I went into the hospital.

Q. When was that?

A. I don't remember exactly.

Q. Do you remember the date of your accident?

A. I do now, because for a long time I lost a week there. When I filled out my insurance reports, I filled them out a week later.

Q. Do you recall now when the accident was?

A. Well, I recall from hearing it here, February 26.

Q. How long after the accident, Doctor, was it before you went in the hospital? Do you remember that?

The Court:

I think the record shows that.

A. It was several days. I don't remember exactly myself whether it was two or three days. I don't remember.

Q. Where was it you went in the hospital?

A. Well, there is one thing I have missed. You asked me if I had a doctor in Clewiston. Well, there is one thing I have always done as a physician. I have—

Mr. Carey:

If the Court please, I move that the witness be confined to answering questions.

The Court:

Just answer the questions, Doctor. Then we can move along a little faster.

The Witness:

I saw a physician in Clewiston.

Q. Did you have a doctor before you got to the hospital?

A. Yes.

Q. Who was that?

A. Well, the next morning I asked at the inn where there was a doctor available, and they said there was one just across the street from the inn. I went over there, and I got over there before he was in, and his nurse told me he had gone to the hospital for an operation, and she voluntarily took me in her car over to the hospital.

Q. Who was that doctor?

A. I don't remember his name.

Q. Did he examine you?

A. He examined me, had I had a hematoma on my abdomen, and he withdrew the blood out of it. That was where the wheel had whipped me and caused like a little cyst to form, and he said if he didn't draw the blood something serious might have happened to me.

I went back to the hotel and arranged to come to Fort Lauderdale, because I felt like something serious might happen to me, and I wanted to get down where there were more doctors.

Q. Do you recall how long after the accident it was before you went into the hospital?

A. No, I don't exactly.

Q. Can you approximate it?

A. Two or three days.

Q. Who took care of you in the hospital? Who was the first doctor?

A. Well, I called up the hospital. I woke up at night with a severe pain in my left leg, and I thought I had a hematoma, and I was scared to death. I called up the hospital and asked them if they would admit me, that I was a physician. They said they would admit me if I called a doctor. I didn't want to bother any doctor that night. They said they couldn't admit me without an accident, but there was an accident case in the hospital, and there was an intern there, and if he will say that you are sick enough to be admitted, he said they would admit me at that time. They only had one bed in the hospital, but they admitted me.

Q. Did the intern examine you at that time?

A. I forgot.

Q. Did you ultimately call a doctor?

A. No. I had nothing to do with it.

Q. Did a doctor ultimately see you?

A. In the morning.

Q. Who was the doctor?

A. Dr. Patterson.

Q. Do you know his full name?

A. No, I don't.

Q. Did he examine you?

A. I guess he did. I don't remember.

Q. Did they give you treatment at the hospital?
A. Yes.
Q. Of what did that treatment consist?
A. The treatment consisted mostly, the time I was in the hospital—he wanted to give me large shots of penicillin, and I wouldn't take them, and I had this penicillin with me, and I asked if it was all right for me to continue the penicillin that I had. He said it was.
Q. Why did you not want him to give you large shots of penicillin?
A. Because I have known of patients that have become allergic, that had serious skin diseases for a long time following such shots.

Mr. Carey:
We move all this be stricken. It has no bearing on the issues.

The Court:
I will deny the motion. It is immaterial.

Mr. Sams:
It is. There is no question about it.

The Court:
I will deny the motion.

Q. Doctor, how long did you remain in the hospital?
A. Five or six days.
Q. What hospital was that again?
A. Broward General.
Q. What doctors saw you while you were there?
A. Well, Dr. Patterson and Dr. Taylor.

Q. Were those the only two doctors who saw you there?

A. That's all I remember.

Q. What were your symptoms at that time? What were you suffering from while you were in the hospital?

A. Well, what I was suffering from most was this intense pain in my left leg.

Q. Were there any other symptoms from which you were suffering?

A. Shock.

Q. Where did you go after you were released from the hospital?

A. I went home.

Q. Back to Kentucky?

A. No, back to where I lived in Fort Lauderdale, because the doctor said I was too serious to make any trips for a while.

Q. What doctor said that?

A. Well, Dr. Patterson and Dr. Taylor.

Q. Were you ambulatory? Were you able to get around?

A. Yes. After five or six days the pain disappeared in my leg, and I was able to get around. I had this big bruise where the wheel hit my head on my forehead, which I used sterile vaseline on, which I carried in my suitcase, and that prevented me from having a scar there.

Q. Dr. Stokes, what were your symptoms after you got home; let us say over the period of the next few months?

A. I had headaches. I was nervous. I was exhausted. I used to sleep sometimes from eight o'clock at night until eleven or twelve o'clock the next day. I had ringing in my ears. When I turned over, I

would hear like hitting a hammer or explosions or different noises.

Q. How long did these things last?

A. Everything seemed to get on my nerves. I didn't take any interest in reading. Food didn't taste right to me.

Q. How long did your headaches last, Doctor?

A. Well, they were almost more or less continuous at first.

Q. How long did that persist; over wl at period of time? We are talking now, let us say, about March of 1952. How long did the headaches persist?

A. Well, I still have the headaches whenever I get under tension or under any mental strain.

Q. What other symptoms do you have now, Doctor, that you had at that time?

A. Well, the symptoms I have now that bother me most are the noises in my ears and the headaches and nervousness, and now I got to the point that whenever I get under a mental strain, I can't sleep at night. But I don't have that high degree of exhaustion where I just used to sleep all the time

Q. Dr. Stokes, what other doctors have treated you over this period of time?

A. Well, Dr. Taylor was always very nice to me, and because I used to have to go to Hollywood to see Dr. Patterson, he took over, and he tried for a long time—

Q. My question was what other doctors have treated you?

A. Pardon me.

The Court:

You spoke of Dr. Taylor and Dr. Patterson.

Q. And the doctor in Clewiston.

A. And Dr. Keedy in Miami.

Q. How did you come to go to Dr. Keedy?

A. Dr. Taylor was the one that recommended me to Dr. Keedy. In fact, he tried to get me to go to Dr. Keedy right from the beginning, but I didn't do it.

Q. Why not?

A. Well—

Mr. Carey:

I object, if the Court please.

The Court:

Sustained.

Mr. Sams:

He cannot give the reason for not going?

The Court:

No. I do not think it is material unless he was physically incapacitated. Maybe he did not want to go.

Mr. Sams:

Maybe, but I think that would have a bearing on the mental attitude which we are trying to demonstrate.

The Court:

I do not think so. I do not think it would be of enough weight to go into that testimony.

Q. When did you first see Dr. Keedy?

A. I don't remember exactly.

Q. Can you give us any idea approximately?

A. It was probably a year after the accident.

Q. Between the time of the accident and the time you saw Dr. Keedy, had you done any work?

A. No.

Could I have a drink of water? My mouth is dry.

(Short recess taken.)

Q. Had you made any further effort to do anything about the mental hygiene project in Fort Lauderdale?

A. No. I had not made any effort about it because of my condition. I was afraid if I tried to make an effort about it, it might affect me from ever being able to enter it in the future. I wanted to get myself straightened out first.

Q. What other doctors have you seen besides Dr. Keedy?

A. Well, I saw Dr. Strickler, who is a neurosurgeon in Louisville, and I have been to see an insurance doctor, Dr. Acten and Dr. Troutman, who used to do all my heart work at the hospital.

When I was up in Louisville—I forgot when it was—I was attending a psychiatric meeting that was there, which I was not a member, but I thought if I was in Louisville, and it was open to all physicians, I would go to it.

I went to it, and after listening to the speaker for about a half hour, I began to develop pains in my chest, in my arms, in my head, and I thought I was having another heart attack. I went over to see Dr. Troutman, but I had to lay there for two or two and a half hours before he could get to me because I didn't have no appointment.

Q. Let us keep our minds on the question. The question, Doctor, was what other doctors have seen you. You have named Dr. Troutman, Dr. Acten, Dr. Strickler, Dr. Keedy. Are there any other doctors?

A. I have seen Dr. LeDrew. Of course, you know that. I have seen Dr. Dornberger.

Q. That would be primarily the doctors you have seen?

A. Well, I have seen Dr. Dornberger for my heart primarily, and Dr. Keedy for my brain injury primarily.

Q. What has Dr. Keedy done for you?

A. Well, he had, I think, an encephalogram made and sent me to a psychiatrist and psychologist. He had me checked up from different angles. I told him I wanted to find out what was wrong with me and find out if it couldn't be corrected.

Q. After this accident, did you make a claim to the Continental Assurance Company?

A. I was a little delayed in making the claim on account of my confused mental condition, and they almost decided they would turn down the claim because I was so late.

Mr. Carey:

I move that be stricken. It is not responsive, and it is self-serving.

The Court:

The objection will be sustained on the grounds it is already admitted there is a filed proof of loss and the action maintained within the time permitted.

Mr. Carey:

Yes, sir. We admit that.

Q. Since your accident, Dr. Stokes, have you been able to do any work of any kind?

A. I used to get out and fool around in the yard, and I had an electric lawnmower. I used to use that. I thought the physical exercise would help my mental condition. But since I had this last heart attack, I have not been able to do anything like that, because everything I do causes me to have heart symptoms.

Q. Dr. Stokes, I am not referring to yard work. By "work," I mean any type of work that is related to your occupation as a doctor.

A. No, I can't remember things. I can't even read things and remember them. I am getting to the point where I can remember past events better than I used to a year ago. At that time I couldn't even remember past events. I can go to a picture show now and see it over two or three times because I seem to miss certain things when I see it.

Mr. Carey:

If the Court please, I move to strike the answer. It is not responsive.

The Court:

The motion will be granted. The jury will disregard the part of the answer that was not responsive, namely, going to a picture show and et cetera.

Q. Will you tell the jury, Dr. Stokes, how your symptoms which you have described to us manifest themselves, let us say, today.

Mr. Carey:

That is leading, and I object to the question as leading.

Mr. Sams:

I do not think that is leading, Judge.

The Court:

It is probably leading, but I will let it go. After all, the witness is also a doctor, and we presume that symptoms mean more to him than it would to the lay person.

A. Well, today my symptoms are better than they were yesterday, and I think describing my symptoms yesterday would more clearly bring out certain symptoms that I have.

Q. Describe to us what your symptoms were yesterday.

A. Yesterday I was so confused that after I left here, my wife had to show me the way back. Today, this morning, I was able to find my way over here very clearly.

Q. Your way over where?

A. To Court from where I parked my car over in the garage.

Q. How does the symptom that you spoke of as loss of memory manifest itself?

A. Well, the thing is I can sit down and read something and not remember a bit of it. I can read an article in the paper, and I couldn't tell you a thing that is in it.

Q. I think I asked you about this, but up to the time you saw Dr. Keedy about a year from the accident, have you, since that time, made any further effort to do anything about the mental hygiene work?

A. No, because in order to do anything about the mental hygiene work, I would have to go to school first and take a post-graduate course, and the reason I didn't come down here with the idea of taking the

state board is because I thought in mental hygiene work I wouldn't be on a competitive medical practice and wouldn't be necessary to take the state board.

Q. Have you made any effort to go back to the practice of medicine either here or any other place?

A. Well, I made no effort, but in Louisville I have an office set up that I can practice in today; in my home here I have an office set up that I could practice in today if I was able to practice.

Q. Have the doctors advised you that you could not practice medicine, or is it your own idea that you cannot?

A. They told me I am totally and permanently disabled.

Mr. Carey:
That is objected to, if the Court please, and I move it be stricken.

The Court:
I am sure counsel agrees. It may be stricken.

Mr. Sams:
I think so.

The Court:
The jury will disregard what the doctor told him.

Mr. Sams:
I think that is all I have.

The Court:
You may inquire.

Mr. Carey:

I would like this marked Defendant's Exhibit #3 for identification.

The Court:

Mark it.

(The document referred to was marked for identification as Defendant's Exhibit #3.)

Cross Examination.

By Mr. Carey:

Q. Doctor, I would like to show you Defendant's Exhibit #3 for identification and ask you if that is your signature at the foot of the instrument.

A. It says here "Describe fully your various duties."

Q. The question I asked you was is that your signature?

A. Yes, that is my signature.

Q. That is the form which you yourself submitted?

A. I don't remember. I must have sent it. It has my signature on it.

Q. Do you recall the answer to the question "What is your business or occupation? Real estate"?

A. I have always dealt in real estate all my life.

Q. That was your answer at that time when this was submitted?

A. The reason I answered that—

Q. I just asked if that was your answer and that your signature.

A. Yes, sir.

Q. This is marked as having been received by the company on October 20, 1955?

A. What company is that?

Q. Excuse me, 1952.

A. What company?

Q. Continental Casualty Company.

That was dated on or about the date on which it was received or a few days before?

A. I don't remember.

Q. The date appears to be 6-4-52. Would that be the date when you forwarded it?

A. It would have to be, but I don't remember.

Q. Doctor, you moved to Florida in 1951, did you not?

A. Yes. I moved down here after I sold the hospital.

Q. You sold the hospital in the fall of 1950, did you not?

A. Yes, but I didn't relinquish it until—

Q. I am just asking, sir, if you did not sell the hospital in 1950 as you testified a few minutes ago.

A. Yes. I sold the hospital in 1950, but I didn't get my money for it.

Q. Just answer the question, please.

When you came to Florida you at no time made any application for admittance to the medical practice in the State of Florida, did you, sir?

A. Well, I wasn't able to—

Q. Just answer yes or no, sir.

A. No.

Q. You were able to make application after you got down here in the fall of 1951 prior to the happening of your accident in February of 1952, were you not, sir?

A. Would you like to know the reason for that?

Q. No, sir. I just want to know if you made an application.

A. No.

Q. You also had a real estate association with Collee-Hammock Real Estate Company?

A. That is a banking name. It never operated as a real estate company.

Q. That is the name under which you bank?

A. That's right.

Q. You have a telephone number where you are reached under that name, do you not, sir?

A. In the last year or so I have put that telephone in there because I didn't want people calling me as a physician on account of my condition. I had to have some number where they could call me.

Q. And the Collee-Hammock Real Estate Company, which is yourself, operated a Collee-Hammock subdivision in Fort Lauderdale, did it not?

A. No. We don't operate.

Q. You have one, do you not?

A. No, I don't. I never had one.

Q Is there a Collee-Hammock subdivision by that name?

A. I think there is a Collee-Hammock Apartment House. Somebody calls me up all the time to rent apartments for Collee-Hammock Apartments.

Q. Your Collee-Hammock company owns and operates two stores located in Lot 16, Block 14?

A. No, not two stores. There is one building there.

Q. Is that a commercial building?

A. That is leased on a ten-year basis.

Q. Who managed that building?

A. No management to it. The lessor manages it himself.

Q. You take care of what management there is as to the management?

A. No, sir. That was in the lease. They took it over, and they would have sole responsibility for it.

Q. Let us put it this way: You have no one to manage the property for you?

A. No. What property I have, I have in real estate companys' hands to handle and sell.

Q. Yes, sir.

When you were at Clewiston, a police officer came along after the accident?

A. No.

Q. And took you to Clewiston?

A. No. You won't let me complete anything.

When I came out of the water, there was a man standing there, and he asked me if he could help me. Another man came up shortly afterwards and took over, took charge of me, and got in touch with the police. He took care of all my luggage and saw that I got to the hotel all right. He looked after me in general, and I tried to get his name, but they wouldn't give me their names. I tried to offer them some reward, and they wouldn't accept any reward. I don't know who they were.

Q. Let me ask you questions, please, and you answer the questions.

Who was it that took you to the Clewiston Inn?

A. They put all my luggage in the police car, and the police took me.

Q. Then it was the policy who took you to the Clewiston Inn?

A. Yes, the police did take me.

Q. They did not take you to the Clewiston Hospital, did they?

A. No. I didn't want to go to the hospital.

Q. Did you have a doctor at the Clewiston Inn that night?

A. There wasn't any doctor available. I tried to get a hold of a doctor, but there wasn't any available.

Q. You went over to see a doctor, then, the next morning, did you?

A. Yes.

Q. And the nurse took you out to the hospital?

A. Yes.

Q. They did not take you into the hospital at Clewiston as a patient, did they?

A. Well, I went in for an examination, to see what my condition was. But he said I did not have to stay at the hospital.

Q. You were not even admitted at the hospital, were you?

A. No, I was not even admitted.

Q. There is not even a hospital record at Clewiston?

A. No. I forgot the doctor's name. I don't know whether he made a record of my visit or not.

Q. You have a record of the doctor who saw you out there, sir, do you not?

A. Not that I know of.

Q. He did not hospitalize you after examining you?

A. I tried to find out who the doctor was, and he moved away from there.

Q. That was February 26, 1952, was it not, when you went to the hospital in Fort Lauderdale? Rather, that was three days later on February 29, 1952?

The Witness:

Judge, I think you are going to have to excuse me. May I be excused for a few minutes?

The Court:

We will take a five-minute recess.

(Short recess taken.)

The Court:
Do you each waive the polling of the jury and consent they are present?

Mr. Sams:
Yes, sir.

Mr. Carey:
Yes, sir.

The Court:
You may proceed.

Mr. Carey:
May I have the question read.

(The question referred to was read by the reporter.)

Q. Doctor, you stated you had a telephone under the Collee-Hammock Real Estate Company's name so that you would not get calls as a doctor?
A. That's right. My wife has quite a few friends, and they could contact her, you see.
Q. Could you not have accomplished that by having an unlisted number?
A. I had an unlisted number for a while, for a long time, but it didn't accomplish any result. I mean, you can check that with the telephone company.
Q. Did you engage in business as the Collee-Hammock Real Estate Company?
A. No, I don't engage in any business.
Q. Do you have an income from the Collee-Hammock Real Estate Company or from its properties?
A. No, never have had an income from it.

Q. Was Dr. Patterson your attending physician at Fort Lauderdale?

A. No. He is in Hollywood.

Q. I beg your pardon?

A. Dr. Patterson lives in Hollywood.

Q. Yes, but was he your attending physician while you were at the Broward Hospital?

A. Yes.

Q. Is it true, Doctor, that you have been going through the period known as the climacteric?

A. Yes. I have been going through that since about 1947 or '48; I don't remember exactly.

Q. The symptoms which come along in that period are practically the same symptoms that you have been complaining of, are they not?

A. No, I don't think so.

Q. There are symptoms of nervousness, tension?

A. Symptoms of nervousness, yes.

Q. Tension?

A. Tension.

Q. Emotion?

A. Emotion. But it seems like that was aggravated by my accident.

Q. At what time did you say that began? You feel you have been going through that period for how long?

A. I just can't remember exactly.

Q. Approximately?

A. About '47 or '48, I think.

Q. You feel that you have about finished with that period now in your life?

A. Well, I had finished with that about the time of the accident.

Q. You had been having some difficulty with that so that it was noticeable to you?

A. I was having difficulty with my wife.

Q. I beg your pardon?

A. I was having difficulty with my wife. I was suspicious of her.

Q. You have had nervous difficulty and an upset condition for some time prior to this accident, had you not?

A. Well, I didn't have them to the extent I couldn't practice. But I had them to the extent that I had to limit my practice.

Q. You had marital difficulties some time prior, had you not? Did they not culminate in a divorce suit in Louisville?

A. That was in 1952 that all happened.

Q. Yes, sir. That divorce action was begun about when, sir?

A. Well, that was—I forget exactly. It was some time in 1952. That's all I can remember.

Q. That, of course, was a very upsetting influence in your life, was it not?

A. Well, I didn't think it was upsetting.

Q. It is not the kind of thing that calms one, is it, in his daily life?

A. Well—

Q. Do you not feel that marital difficulties are just about one of the worst and most upsetting things in a person's life?

A. One of the reasons I had this accident was due to the fact that I was trying to slip in here and surprise my wife. I didn't think she would even be angry at me that night, and if I had not tried to slip in that night at dark when it was raining, I probably wouldn't have had the accident.

Q. The suit for divorce was filed in Louisville, was it not?

A. Yes.

Q. Was that not filed before you came to Florida?

A. I can't remember when it was filed. There is a record in Louisville. You can check on it.

Q. Do you remember when it was?

A. No. It was never filed. No, it was never filed.

Q. It was never filed, Doctor?

A. No, it was never filed. It was to be filed, but it was never filed, it seems like to me now. If it was, I don't remember.

Q. At any rate, you and your wife had gone through a period which developed the time when you were more recently in Louisville as well as the time when you were down here in Florida. Is that not true?

A. I think the period that I went through that aggravated—The period I went through aggravated my emotional instability, and that was due to the fact of selling the hospital and going through all the strain that I had to go through at that time in closing up the hospital and revamping my whole life.

Q. Your outlook has been improving now for some time, as a matter fact, since your reconciliation with your wife in around 1952, has it not, Doctor?

A. My outlook has improved, but I am still so nervous that I get under her skin a lot and worry her a lot, which I should not do.

Q. Doctor, you have talked about a proposed hygienic job or a job doing that type of work?

A. In mental hygiene.

Q. That was merely some political connection you thought you might develop, was it not?

A. No. I had definite arrangements with that. I have a letter in my pocket here that proves it.

Q. You were hoping to get an appointment, were you not, on some state board?

A. No. That was to do mental hygiene work. At that time they didn't have any physician in Fort Lauderdale that did mental hygiene work.

Q. Tell me, Doctor, why did you show on this report, this claim report of June 4, 1952, that your occupation was that of the real estate business?

A. Well, the reason I showed that is because I have been in the real estate business, that is, owning and selling a piece of property of my own, but I have never engaged in the purchase of it. I always pay an agent a commission to sell it or buy it. I thought when you said I wasn't a physician any more that I had to put down something there, so I put down real estate.

Q. Your words on this form as to what your business or occupation was then describes your various duties as management-selling and buying before March 4, 1952. What did you mean by that, sir?

A. Well, what I meant by that was after I sold the hospital I had been so busy engaged in the practice of medicine for ten years, that I had some real estate in Louisville that I couldn't repair, and I had never managed it because I always paid another man a commission to manage it and handle it for me. In fact, I didn't even have to do the repairing if I didn't want to.

Q. Doctor, when you went to Clewiston and was examined by a doctor, he did not treat you at all, did he?

A. The only thing he treated me for was to withdraw this blood from the hematoma on my abdomen. He told me to go back to the hotel and go to bed and stay in bed for a while.

Q. It was not serious enough for him to tell you to come into the hospital and stay right then?

A. They were filled up. They didn't have room for a patient like me.

Q. He did not recommend that you go to a hospital, did he? He recommended you go back to the hotel. Is that right?

A. He told me to go back to the hotel and stay in bed until I could go to Fort Lauderdale, and he would see me later. I didn't want to do that, so I came on to Fort Lauderdale.

Q. You did not go to the hospital then until three days later when you went to the hospital in Fort Lauderdale, did you?

A. That's right. I didn't want to go there, and I wouldn't have gone there if I didn't have the severe pain in my leg.

Q. But you did not go until then, did you, sir?

A. No, sir.

Mr. Carey:

I believe that is all, sir.

Mr. Sams:

That is all I have, Judge.

The Court:

You may come down, Doctor.

(Whereupon, the witness was excused.)

The Court:

We will adjourn until nine-thirty tomorrow morning.

(Whereupon, at 5:00 p. m., the hearing adjourned until 9:30 a. m. January 25, 1956.)

In the District Court of the United States for the Southern District of Florida, Miami Division.

Edgar W. Stokes, Plaintiff,
vs. No. 5607-M.Civil.
Continental Assurance Company, an Illinois Corporation, Defendant.

Miami, Florida,
January 25, 1956.

Thereupon, MRS. MITTIE STOKES, was called as a witness on behalf of the Plaintiff, and having first been duly sworn, was examined, and testified as follows:

Direct Examination.

(By Mr. Sams):

Q. What is your name?

A. Mrs. Mittie Stokes.

Q. Mrs. Stokes, what is your address?

A. 1300 South East 1st Street, Fort Lauderdale.

The Court:

You are the wife of the Plaintiff in this case?

The Witness:

Yes.

The Court:
You reside with him?

The Witness:
Yes.

(By Mr. Sams):

Q. When were you and Dr. Stokes married?

A. In 1924.

Q. Mrs. Stokes, I am not going to go over all the things that were gone over with the other witnesses, and the jury have already heard most of the facts; but I will ask you some questions. First of all, how long did Dr. Stokes operate his sanitarium?

A. Well, he took it over in 1924 when his father passed away.

Q. That was the same year you were married?

A. We were married in 1923. I am sorry; then his father passed away in January, and he took over the Hospital in June.

Q. Did he operate that continuously?

A. Yes, he did.

Q. Until when?

A. Well, until he sold it in 1950.

Q. Did you and Dr. Stokes have some marital difficulties?

A. Yes, we did.

Q. When did that begin?

A. Well, about two years before he sold the Hospital he became very nervous and upset, and he couldn't get along with anyone, and everything that was wrong, he blamed me for it; and he got to the point his business was going down; and I got to begging him to sell it, so he blames me now for selling it.

Q. When did he sell the sanitarium?

A. Well, I think he gave you that record yesterday. It was in 1950, I believe.

Q. Prior to that time did you leave him?

A. No. I left him after he sold the hospital. It was impossible to live with him. He was just so nervous, and he blamed me for everything, and I didn't get any rest at all. He walked the floor practically all night every night, and he was so jealous of me. We would go to Church, and an elderly couple came up and talked to me; and while he was holding my hand and talking to me, and telling me about a trip he was making to Florida,—when he got home he treated me terribly about it, and said I had gotten familiar with the man.

Mr. Carey:

If the Court please, I object to this line of testimony as being immaterial to the issues here.

The Witness:

If you will bear with me, I think I can tell you. It all led up to a terrible state.

Mr. Sams:

I think this goes to show the condition—

The Court:

Let's don't go into details. The witness is very nervous. It was difficult to live with him.

Mr. Sams:

I think some of the details are going to be important to describe the man's condition.

(By Mr. Sams):

Q. Prior to this time had Dr. Stokes been in the condition you are describing now?

A. No, he had not. He was a very successful business man as well as a Doctor. He really got his patients well, and he had treatments that he worked out himself that helped these people.

Q. When did Dr. Stokes come to Florida?

A. Well, we had been back and forth to Florida for many years because my husband had an asthmatic son, and he came to Florida. He was on his way down at the time he had this accident.

Q. Were you at that time living with Dr. Stokes?

A. No, I was not. My lawyer had—

Q. Don't go into details. You were not living with him at that time?

A. No.

Q. I wasn't your lawyer, or Dr. Stokes' lawyer at that time?

A. No. A lawyer in Louisville.

Q. When did you and Dr. Stokes go back home; when did you start living with him again?

A. I cannot give you the exact date.

Q. Approximately?

A. It was about a year and a half after he had had this accident.

Q. Can you describe to us what Dr. Stokes' condition has been since you have been living with him since this accident, or gone back with him after this accident?

A. Well, it has been a terrible thing to put up with.

Q. Tell us about it?

A. When a person is unbalanced, he, of course, feels like everyone is following him. When we get out to go any place in the car, or walking—we live

on a corner, and when cars pass they naturally throw the lights on our house, and he thinks they are doing it just to aggravate him. We sit at the table to eat, and he has to get up to see the cars when they pass. Naturally a lot of them blow their horns on account of the corner, and he thinks they are blowing their horns just to aggravate him. At night, if we go any place to eat, he looks in the closets and under the beds, and everywhere. In the middle of the night many times he comes in and puts on my light and says, "Who were you talking to?" when I was sound asleep.

Mr. Carey:

If the Court please, I wish to move to strike this testimony. The Complaint is this man was disabled from the accident on February 29, 1952, and that subsequently, while disabled, he had a heart attack, by the amendment to the Complaint; and this testimony shows prior to the accident they were separated and not living together, and had marital difficulties; and I don't think it is a proper line of testimony, and I object to it and ask that it be stricken.

(Argument off the record.)

The Court:

I will let it go in, and you will have to amend your pleadings.

Mr. Sams:

If our pleadings do not conform to it, we will.

The Court:

We will go ahead, and you may move to strike it, Mr. Carey.

(By Mr. Sams):

Q. Mrs. Stokes, has Dr. Stokes engaged in any business activities since the two of you have been back together?

A. He couldn't. No, he has not.

Q. Did you do anything about his business at all?

A. That's another thing. He used to discuss his business with me, and since the accident, being as bad as he was, he wouldn't discuss anything with me. He won't tell me anything about his business.

Q. Does he carry on correspondence with people?

A. Some. He simply lets his mail pile up until his desk at home is way so high with everything. Months and months later maybe he would look at the mail that should have been attended to earlier. He has that chair and his desk piled with mail and things that should be attended to, and he takes my dining table and puts everything on that, and I am not allowed to touch it. In his bedroom I can only go in to make his bed and fix his floor, his chest and dresser, and everything is piled over everything in there.

Q. What does he do during the day?

A. Well, for a while he could not read. Now he sits and reads a little, and he walks and paces the floor most of the time. He will sit down and listen to some programmes on the radio, but he doesn't do really anything.

Mr. Sams:

I think that's all.

Cross Examination.

(By Mr. Carey):

Q. Mrs. Stokes, did I understand you to say that you had separated from your husband because of these difficulties before this accident on February 2, 1952. Is that correct, ma'am?

A. That's correct.

Q. When your husband moved down here did he not come down here to retire from his practice?

A. Well, he had an office, and he kept up all of his medical connections.

Q. He had no intention of applying for a license to practice medicine in Florida, did he?

A. Yes. He had talked to this man before.

Q. That was a political appointment, was it not; he hoped to get appointed to the Political Board?

A. I don't know what kind of an appointment you would call it, but he was going into medical work, consultation work.

Q. The question is, he never applied to the Medical Board or made any application to practice as a Doctor down here, did he?

A. He had the accident on the way down and from there on he wouldn't be able to do anything about it.

Q. He had been down in Fort Lauderdale prior to February 26, 1952?

A. We were down here part of the years several years before.

Q. You had your home in Fort Lauderdale a number of years prior to that, hadn't you?

A. That's right, because I kept my son down here. He had asthma.

Q. And he had retired from his practice when he sold out his sanitarium and came down here in retirement from his practice, had he not?

A. He didn't say he was retiring.

Q. You understood it to be that, didn't you?

A. He was getting rid of his hospital because he wasn't able to carry on there. I don't know that the word "retire" entered into his conversation with me. I never heard it.

Q. When was the time that he started to use the Collee-Hammock Real Estate Company name?

A. I think he told you yesterday. He has bought property himself and sold it for a long time. Prior to this he had bought some property, and of course he wanted some connection with the public; and he said he would take that name, and if he had someone who wanted a property, he would always refer them to an Agent.

Q. When did he start to operate as the Collee-Hammock Realty Company; when did he start using that name?

A. He opened that as a Bank account. I couldn't tell you the date, but somewhere near the time when we came down here.

Q. That would be when, 1949?

A. As I told you, I don't know. He stopped taking me into his confidence and telling me those things, and I don't know when he opened that.

Q. When to the best of your recollection did you folks move down here to Fort Lauderdale? Was that in 1949?

A. We hadn't completely moved down here. We were living in Louisville in our apartment. We came down here in 1950.

Q. When did you buy the Home in Fort Lauderdale?

A. We bought the home in 1938, not the home we live in now, but it was three blocks from where we live now.

Q. I understood you to say that he started to use the Collee-Hammock Realty name at about the time when you came down here. What did you mean by that?

A. As I say, I do not know when he opened that up, but it was around the time when we came down here to live.

Q. When was that about?

A. Well, he was on his way down here when he had the accident. That was in 1951 or 1952, whatever it was.

Q. When did you separate from him?

A. You have the record there. Around the first of February I think it was.

Q. In what year?

A. The same year he came down.

Q. That was after the accident happened?

A. That's right.

Q. He has been a nervous type of person for many, many years, hasn't he?

A. Yes. For two years, as I told you, before he sold the Hospital he was very nervous, and he just couldn't converse with people. If they didn't believe or think like he did, he got mad about it.

Q. He was a nervous, neurotic type of person most of the time you have known him. Isn't that so?

A. No. He was a wonderful husband, and a wonderful man.

Q. Now Mrs. Stokes, does your husband drive a car?

A. Sometimes he drives it for a short period now.

Q. Did he drive down here?

A. No. I drove down here. There is too much traffic, and he gets nervous.

Q. I understood him yesterday to say that he parked the car; did he park the car?

A. No, he did not. We parked the car over at—I don't know what the building is.

Q. Has he driven down here from Fort Lauderdale recently?

A. Well, part of the way. I couldn't tell you just when that was, but when he gets into traffic and all, I have to take over because he gets nervous, or gets to day-dreaming. He will look far ahead and doesn't seem to realize what is going on around him.

Q. Just to clear up one or two things. He had this sanitarium which he inherited from his father, and he started to operate it about 1923. Is that correct?

A. No. He started operating it in 1924. We were married in 1923, and he had that year in school, and then his father passed away in January of 1924, and he graduated in June, and he took over the Hospital at that time. Of course, he had an assistant Doctor with him.

Q. Has he tried to do any other work, such as working in the real estate business and that sort of thing in the last years?

A. No, he hasn't.

Q. He hasn't tried to do any work of any kind since he left Louisville and he sold the sanitarium. Is that correct?

A. No, he has not.

Q. That's true all before the accident ever happened; in other words, he hasn't tried to do any work since he left Louisville and sold the sanitarium. Is that correct?

A. None whatsoever.

Mr. Carey:

I believe that's all. Thank you very much.

Mr. Sams:

That's all.

Thereupon, CHRISTIAN KEEDY, was called as a witness on behalf of the Plaintiff, and having first been duly sworn, was examined, and testified as follows:

Direct Examination.

(By Mr. Sams):

Q. Will you state your name?

A. Christian Keedy.

Q. Are you engaged in the practice of medicine in Dade County, Florida?

A. I am.

Q. Where is that, Doctor?

A. My office is in the duPont Building.

Q. And are you engaged in any specialized field in the practice of medicine?

A. Yes, I specialize in neurology and neuro surgery.

Q. Would you tell the jury what the field of neurology and neuro surgery is?

A. We are primarily interested in those diseases and injuries of the brain, the spinal cord and the parietal nerves, the nerves that extend out from the brain and the spinal cord into the extremities of the trunk.

Q. Does neour surgery mean surgery for the brain?

A. Yes. If any of these illnesses or diseases can be helped by surgery, we actually perform the surgery on the brain and spinal cord.

Q. Doctor, would you state for this jury what your educational qualifications have been to qualify you for your specialty in neurology and neuro surgery?

A. I was graduated from Amherst College in 1937, and Cornell University Medical College in 1941. I then had an internship in general surgery at Bellvue Hospital, New York City, and then a residency in neuro surgery at Bellvue Hospital. I then had a residency in general surgery at—that included neuro surgery, at the Memorial Hospital in Worcester, Mass. I was then in the Armed Services for thirty one months, and I was first sent to the Army neurosurgical school which was at Columbia University. I was then assigned to the neurosurgical section in Texas, where I stayed for about a year, and was then sent overseas to the neurosurgical Evacuation Hospital which operated in the European theatre. After being overseas for eighteen months, I was returned to this country, and discharged from the Army, and took a residency in neuro surgery at Albany Hospital in Albany, New York. I was then attached to the brain tumor registry at Yale University in Connecticut. Since 1948 I have practiced neuro surgery here in the Miami area, and have been associated with Dr. Tracy Haverfield.

Q. Dr. Keedy, are you a member of any Societies within your specialty of neuro surgery, or within the medical field generally, and if so, would you state to the jury what they are?

A. I am a member of the Harvey Cushman Society, the Neurosugical Society of America, the Southern Neurosurgical Society, and the Congress of Neurological Surgeons; I am also a diplomate of the American Board of Neurological Surgeons.

Q. Doctor, is the membership in the American Board of Neurological Surgery, is that one that is honary, or is there an examination?

A. No. In order to become a member or become a diplomate, as it is called, in the American Board of Neurological Surgeous, first you must have a number of years of special training in neuro surgery; and you must have practiced for two years, and then you must have passed an examination which is given by the Board.

Q. Doctor, are you on the staffs of any local Hospital, and if so, will you tell us which ones they are?

A. I am on the staff of St. Francis Hospital, Mercy Hospital. Director of the Neurological Surgery Department of the Dade County Hospital in Kendall. Director of the Neurological Section at Jacksonville. I am on the staff of the Variety Children's Hospital, and I am attending at the Veteran's Administration Hospital, and I am neurological surgeon consultant for the Veterans' Administration Regional Office.

Q. Dr. Keedy, have you had an opportunity in your specialty to examine and to treat Dr. Edgar W. Stokes, who is the Plaintiff in this case?

A. I have.

Q. Before you go into your examination and treatment, and so forth, approximately how many times have you seen Dr. Stokes?

A. I can just estimate it. I haven't counted up, actually, and I don't have my card with me; but I have seen him over a period of three years. I averaged about every six weeks,—six to eight weeks.

Q. During the course of your examination how long would he be in your office?

A. Anywhere from an hour to a hour and a half on each occasion.

Q. When did you first see Dr. Stokes?

A. On the 30th of January 1953.

Q. And you are still seeing him at the present time?

A. Yes. I saw him in December of last year.

Q. Do you know how Dr. Stokes came to your office?

A. He was self-referred to my office on his own volition. I don't know how he happened to know about me.

Q. Can you tell us, please sir, what your initial examination consisted of, and what history you received from Dr. Stokes, and what your opinion or conclusion was at that time?

A. I first saw him on the 30th January, 1953, and at that time he came to me because of continued headaches and dizziness, nervousness and inability to make decisions, and he gave me the history that on the 26th of February, 1952, approximately a year before I saw him, that he had been in an automobile accident; that he was driving in the vicinity of Clewiston, and the roads were slippery, and that he skidded, and the car went out of control into the canal. There is an area there where he is not sure what happened. He said he was rendered unconscious and became aware of his surroundings when he was in the water floundering around, and he stated that he was helped out of the water by someone who was passing by. He complained of some pain at that time, and bruises on his leg and bruises on his head. He stayed that night in Clewiston, and the next day was taken over to Fort Lauderdale and there went under the care of a Dr. Taylor, because of pain in his leg and because of bruising on the left side of his forehead; and he stated that he was kept in the

Broward General Hospital for four or five days. The specific complaints at the time when I saw him, which was a year approximately after the accident,—he was complaining mostly about difficulty in remembering dates, being unable to concentrate on anyone or anything for any period of time. He stated that he had become excessively nervous, and he feels insecure and does not as competent as he formerly did in taking care of his affairs; and he stated he was afraid to go into any business ventures for fear he would not be able to make the proper decisions. He stated he has trouble spelling certain words which were well known to him, and which he formerly had no trouble with. He states that at times he notices he rambles in his conversation, and cannot remember what he says, and cannot go on and finish his conversation. He contributes this to having a poor memory. He also states that he has had some dizziness, but this has improved. He states that he frequently mislays things. He states he continues to have mild headaches, and at times feeling heaviness around his heart. He states that whenever he does anything that requires any concentration, it usually produces a headache, and not infrequently, a heaviness around the heart. He complains that he tires easily, and becomes exhausted in attempts to do any type of work. He complains of constant itching in his ears, and recently he has been to an ear Doctor to see about this. He also complains of ringing and hissing sounds in his ears. He stated that he formerly in 1939 had some blood in his urine. At that time he was seen by some Doctors at Johns Hopkins. He also stated he previously had some type of minor heart attack and was taken care of when he was in Louisville. He stated he formerly ran an sanitarium in Louisville,

but that he had given this up because it got too much for him, and it was making him too nervous. Now on his general physical examination, all of his examination was essentially negative. He was alert and cooperative and somewhat garrulous and rambling in his history. He was well oriented; he was able to stand in a normal position without swaying. The skull was externally negative. There is an area somewhat lighter than the rest of his forehead on the left frontal region, where he stated he had this abrasion. The visual fields were full to gross testing. The extraocular movements were well done. The fundi appear normal. There was some mild A.V. nicking. That is, looking into the eyes, looking at the vessels, the retina. They show some very slight evidence of hardening of the arteries,—those arteries which you can see by looking into the eye. There is no exudate or hemorrhage. Sensation over the face was intact. There is no facial weakness. Hearing is grossly normal. He talks and swallows without difficulty. The tongue protruded in the midline. There was good strength and co-ordination in all four extremities. Finger to nose test and heel to shin test was done satisfactorily bilaterally. Sensation to pin prick, touch, vibration, and position sense is intact throughout. The tendon reflexes are active and equal in both the upper and lower extremities. Planter reflexes are flexor in response. The blood pressure is 120/80, which is perfectly normal blood pressure. The heart sounds are regular and of good quality.

Now at that time I felt that the patient was suffering from a post concussion syndrome which was manifested by mild headaches, forgetfullness, difficulty in concentrating, and irritability. I didn't feel that he showed a great deal of arteriosclerosis in his

parietal vessels. He undoubtedly has some arteriosclerosis. People that have had any degree of arteriosclerosis never stand head trauma as well as other individuals. However, I felt over a period of time that it would gradually improve, and felt that an electro encaphalogram ought to be done.

Q. What is a post concussion syndrome; what do you mean by that?

A. We make the diagnosis of a concussion on any person that has had a blow to the head of sufficient degree to render them unconscious or have them a period of disturbed consciousness. That comes from a general shaking up of the brain. After that type of injury, which is concussion, people frequently complain of headaches, dizziness, irritability, nervousness, difficulty in concentrating and memory difficulty, and those are all of the same symptoms that this patient was complaining of. Therefore I felt that he had a post concussion syndrome.

Q. Now Doctor, over the period of time that you saw him, that would be the past three years, during the intervals that you have seen him, has your opinion or conclusion from your first examination changed at all?

A. It has changed in some respect. As I saw him over a period of time certain things came out. Primarily psycho neurotic tendencies, and some tendencies verging on being truly psychotic.

Q. What do you mean by that?

A. In my first history I didn't elicit from him that he was having a lot of emotional difficulty as far as being suspicious of people. He told me that at various times he thought people were following him and people going by his house and shining lights in the windows, and he would get up at night and run out

of the house thinking someone was annoying him,—not really thinking it was harmful, but he just couldn't control these ideas; and when he drove his car particularly at night with the lights on, he would feel that these lights were following him, and would become extremely nervous and upset over these ideas. He also became suspicious of his wife at times, and would think that certain very casual remarks had special reference to him, and that made me feel that his basic personality structure, even before this accident, was probably one of strongly psycho neurotic trend.

Q. What does psycho neurotic mean; what do you mean by that?

A. When we talk about a psycho neurosis we are talking about someone that is unstable emotionally. All of us vary in different degrees to handle our emotional response to questions. Many of us get very emotionally upset very easily; and those people we say are psycho neurotic,—it is a gradation from your normal response. All of us have an emotional response to things, but those who respond excessively emotionally, or a good bit more than average, then we classify them as being psycho neurotic but it is an exaggerated normal response. Now when you get into the field of delusional ideas,—people that feel and believe something that isn't true, and has no basis, then they are bordering into the field of being psychotic. In other words, they are out of touch in certain respects with reality with the factual situation. It isn't that they are responding emotionally more in a normal way. It is they are actually having false ideas that have no factual basis. We feel these paranoid ideas about people following him and looking in the window,—they were not based on factual information.

Q. Do you feel, Doctor, from your numerous examinations of Dr. Stokes that he was sincere in his complaints?

A. Yes. I have never felt that he was feigning in his complaints or attempting to exaggerate any of his complaints. He is an extremely unstable, emotional type of individual. One who is extremely concerned over his bodily function. He complained of many, many things. He would send me long letters describing how he felt, and when he went to write a few words, he would get hot, and would perspire, and his toe would get numb,—many traumatic complaints which actually aren't due to any organic disease of the nervous system, any malfunction of it from any actual destruction of the nervous system, but due to an over-emotional play that produces those symptoms.

Q. Do you feel that the accident he had in 1952 had any bearing on his present condition?

A. Yes. In discussing it, I would say this, that I think that he first of all was a 55 year old man, who had already had some difficulty in running a sanitarium. He had been running a sanitarium, but things got more than he could stand. He said he couldn't stand it any longer, take care of the patients, and problems and decisions he had to make was more than he felt he could do. And he had given up that, and he started to Florida with the idea, he said, of getting some job down here in mental health, sort of preventive psychiatry; and on the way down here he had this accident, and I think from the history he did sustain a concussion, and the concussion and the psychic trauma, the tremendous emotional re-action that he had to this accident of being thrown in the canal and his brain being shaken around, markedly

aggravated all of his pre-existing difficulty, plus giving him the headaches and dizziness, which many times follows a concussion. I think that the accident itself exaggerated his pre-existing psycho neurotic tendency, and superimposed on that a post concussion syndrome. When you do that, the headaches and dizziness, and so forth, give the patient more concern and causes the psycho neurotic manifestations to be more pronounced.

Q. You mentioned something about an electro encaphalogram. What is an electro encaphalogram?

A. An electro encaphalogram actually is a recording of the eletrical activities of the brain. It is very similar to an electrocardiagram. The electrodes are placed on the body, and the impulses from the heart are recorded, so you can deal with the brain by placing small wires on the scalp, and with an amplifying system you can actually record the little electrical impulses that are given off by the brain, and if there is an organic lesion of the brain, that is, if there is a blood clot there, or any destruction of the brain tissue, you can get a disrhythm instead of a normal rhythm. There is an irregular rhythm over that area. We had this done out at the University of Miami, and the record that we obtained was that it was a normal record, indicating that he hadn't sustained any actual tearing of his brain, or any blood clot, or anything of an organic nature.

Q. Did you have any other tests run on him?

A. Yes, we had some psychometric tests run. Those are tests in psychology which tests the intelligence, and it is to determine whether an individual can concentrate over a long period of time, whether his memory is good, whether or not he is able to make decisions in the normal amount of time with the normal speed, and these tests show—

Mr. Carey:

Just a moment, please, Doctor. If the Court please, I object to the relation of any tests taken by somebody else, unless the Doctor took them himself.

The Court:

Sustained.

(By Mr. Sams):

Q. Did you use these tests in any way in forming any part of your diagnosis or in corroborating your diagnosis?

Mr. Carey:

I object to that. It is immaterial. If he did, that portion of his diagnosis should be stricken.

The Court:

He can recite the patient complained of so and so, and he knew the patient took certain tests.

(By Mr. Sams):

Q. Do you have with you the records of the tests that were made of Dr. Stokes? The psychometric tests?

A. I have the report that was rendered.

Q. Do you have that with you here?

Mr. Carey:

I make the same objection.

The Court:

Sustained. He can state he had reports, and based upon those reports, any findings he made, plus his examination. I don't think it is too material. I think

the main thing is what is the condition of this man, and what it has been.

Mr. Carey:

It is a subjective type of examination. We should have the right to examine the one who made the tests.

(By Mr. Sams):

Q. Did the report that you received of this test corroborate your opinion that you have stated?

Mr. Carey:

That is objected to, if the Court please.

The Court:

Sustained.

(By Mr. Sams):

Q. Does the report show the actual results of the test?

A. Yes.

Q. In detail?

A. I do not have the complete report.

The Court:

The report shows the conclusions of the person who made the test. Is that correct?

The Witness:

Yes. The evaluation of the person who made the test is tabulated on the report. These tests are complicated tests.

The Court:

That's the reason why you should have the tests here, so they would be subject to examination.

Mr. Sams:

I didn't learn of these tests until this morning.

The Court:

I don't think it is too material anyway.

(By Mr. Sams):

Q. Dr. Keedy, from your examination and the history you have elicited from him, and your observation of him, and your treatment of him over a period of three years, is it your opinion that Dr. Stokes is now suffering from any disability?

A. That is right.

Q. I wonder if you would tell us, Doctor, to what extent you feel Dr. Stokes is disabled at the present time?

A. You are talking about disability, disability for what? He isn't showing a physical disability as far as being able to walk around and dress himself, and so forth, but he is showing a marked disability in his mental functioning power, in what we frequently call loss mental efficiency. He just cannot do mentally, and cannot operate mentally in an efficient way; and I don't think he is mentally operating efficiently to do any type of productive work. Certainly I don't think he is able to carry on as a physician I doubt if he could do any type of work that requires him making decisions or planning. Those are the spheres in which he shows a great deal of difficulty mentally; and also his emotional instability with all of his activities, and I think occupationally he is completely disabled.

Q. Dr. Keedy, over what period of time do you feel that he has had this disability, based on your examinations, and your observations of the man?

A. I think he has had this disability ever since I have examined him.

Q. That's over the period of the past three years?

A. Yes.

Q Have you reached any opinion or any conclusion as to whether or not he was disabled before he came to you?

Mr. Carey:

I object to that, if the Court please. It is mere speculation.

The Court:

Yes. You can ask him if he was disabled when he first saw him.

(By Mr. Sams):

Q. Do you feel that at the first time you saw him, in other words, on your first examination, did you feel at that time he was disabled?

A. I did.

Q. Have you arrived at any opinion whether he was disabled for any period before that time?

Mr. Carey:

I object to that. It depends entirely upon the subjective history that this man gave to this Doctor.

The Court:

It might not.

Mr. Carey:

The testimony is that all the neurological examinations were negative, if the Court please.

The Court:

You can bring that out on cross examination. Let's put the question this way. Do you think the condition he was in, which you say was disabling, at the time you first saw him, was a condition that had been in existence for some period of time?

The Witness:

Yes, I think it existed certainly from the time of the accident, which was a year previous to my examination of him. I have no information of how disabled he was before that time other than that he had given up his job of running the sanitarium, because he felt that it was too much for him.

Mr. Sams:

I believe that's all I have.

Cross Examination.

(By Mr. Carey):

Q. Doctor, did you come to the conclusion when you first saw him that he was disabled at that time?

A. I felt that he was having a lot of trouble at that time. He was having headaches. I didn't evaluate him as to actual disability at that time.

Q. You didn't feel then that he was disabled, did you, Doctor?

A. Yes, I did. You have to say disabled for what, and how much. If someone comes in and tells you they are having a lot of trouble, headaches, and so

forth, on the first examination I think it is difficult to know exactly what degree he was being disabled, but I think that he was having a lot of disability as far as his work was concerned. He was not physically disabled. He could move his arms and legs all right. He had no definite limitation, and I felt that there might be some type of work which he could do at that time.

Q. You didn't feel that he was totally disabled at that time, did you, Doctor?

A. I thought he was totally occupationally disabled as a physician at that time, but I thought there would be other type of business work he might do.

Q. Doctor, do you recall giving a written report over your signature to the North Western Mutual Life Insurance Company on June 26, 1953, in which, in answer to question 7a, "Is the insured now totally disabled?" You answered, "No." And in answer to question 7b, "From what date has the insured been continuously totally disabled?" And your answer, "Has not been while under my care."

A. Yes, I recall that. Let me qualify that type of disability. That doesn't talk about occupational type of disability. When we talk about being physically disabled, we talk about somebody that cannot function physically, or is completely incapacitated physically; and that was my interpretation, what that meant. I still interpret that the same way. He was not completely physically incapacitated from a physical point or view at that time; but I still maintain, and have in subsequent clarification of that, and had many letters back and forth over this very issue with the same Insurance Company—clairifed that to the best of my ability exactly what I meant.

Q. You made the flat statement in this report that he was not totally disabled, and had not been while under your care, didn't you, Doctor?

A. Yes, may I explain that again.

Q. I believe you have already spent some time on it. Doctor, when you examined this man in January of 1953, you went very quickly over the parts of your report that were negative. As I understand, your neurological examination was negative. Is that correct, sir?

A. Was negative and has always been negative, as it is in so many other illnesses.

Q. I understand, sir. Now, in other words, we can rule out any damage to the brain from every test that you have taken, as organic damage to the brain, can't we?

A. Yes. I think that's true. When we talk about post concussion syndromes we get into a field that isn't well understood, and we are divided into various schools on what is the cause of post concussion headaches, and memory difficulty, and so forth. Some feel that it is all of an emotional basis. One school says, "This is due to the psycho trauma." Others feel that it is due to a,—to which I am adherent,—due to a change in the vascular supply to the brain secondary to the shaking up that produces a lability of blood supply,—that is, a changing in the blood supply which produces dizziness and headaches.

Q. There was no evidence of any organic injury to this man's brain or to his nervous system, was there?

A. None that I found and could find.

Q. Now putting it another way, there was no objective evidence, no evidence that you could find of an objective nature over which the patient had no control, that he had had a concussion, was there?

A. No. The only way you could have objective evidence of concussion, was to be there and see the patient rendered unconscious. I had no reason not to believe the patient, and I believed the patient, and therefore the diagnosis of concussion is based on the history.

Q. That's what I am getting to. Your diagnosis of the post concussion syndrome, must, of course, have been predicated then upon the truth of the history that he gave you, that he had concussion in the first place?

A. That is absolutely true.

Q. And, of course, it is almost ridiculous to say had there been no concussion, then, of course, there would have been no post concussion syndrome?

A. No. But the symptom complex of which he complained did fit, or was compatible with a post concussion syndrome.

Q. It would have been compatible with many other situations, would it not?

A. Compatible to some other situations, not many.

Q. Would it be compatible, or would it not, Doctor, with a general nervous condition, upset condition, induced by many possible things,—trouble in the home, pending litigation?

A. Yes, it could be on an highly emotional basis.

Q. Pending claims?

A. It could be on anything, I think, that would produce a severe emotional response, except all of your headaches, and dizziness—

Q. Doctor, did you ever send this man to a psychiatrist for treatment?

A. I sent my records over to Dr. LeDrew.

Q. You examined him purely for examination purposes, and not for treatment, isn't that true?

A. Yes.

Q. And examined him only once?

A. Yes.

Q. Did you ever send this man to a psychiatrist for treatment?

A. No, not for treatment. I sent him to Dr. Jarrett for evaluation.

Q. And he has been with you as a patient for three years, has he not?

A. That's true.

Q. And you find in your opinion psychotic tendencies?

A. Yes, he has psychotic trends.

Q. Now the treatment of psychiatric diseases and disturbances is not within your field, is it?

A. No. I didn't classify myself as a psychiatrist. I treat many psycho neurotic individuals, and in several instances we take care of psychiatric individuals.

Mr. Carey:

I object to that.

The Court:

Doctor, you can answer the questions, and then explain them if you wish. I don't blame the Doctor for making an explanation, because that often happens. Try to answer the questions, and then make your explanation. Answer as concisely as you can.

(By Mr. Carey):

Q. Doctor, my point is this. When you say a man is psychotic, that borders on the insane, doesn't it?

A. Yes, if you say he is psychotic—

Q. I didn't say it. I am asking you. Didn't you say this man was psychotic,—didn't I hear the word "psychotic" mentioned in your description—

A. I said he had some psychotic trends. I didn't say he was psychotic. I am talking about the sociological thing, not a medical thing.

Q. Do you think his psychotic trends are so bad that he is incapable of engaging in any form of occupation for pay? You think so, don't you? Isn't that your opinion?

A. No. Is that what I stated?

Q. I understood it to be what you stated, yes, sir?

A. I stated this, that I think that his inability to function mentally efficient enough to be engaged in any occupation, comes from these various sources: One, his basic psycho neurotic tendency. Two, his concussion and post concussion syndrome, which I feel has aggravated his psycho neurotic tendency; and his psycho trends, that is, his ideas,—delusional ideas about people,—it is a combination of all of those that makes him, in my opinion, so inefficient mentally that he cannot productively carry on an occupation.

Q. Has that disability, in your opinion, continued from the time that you first saw him on January 30, 1953?

A. Yes. I think it has been since that time. He has told me repeatedly—

Q. Doctor, you have answered the question. Now, Doctor,—

Mr. Sams:

He can explain his answer, Judge.

The Court:

The attorney was right. He was not explaining that. The explanation must be confined to the answer. In other words, it must be some explanation and the reason for the answer.

(By Mr. Carey):

Q. And yet, Doctor, feeling in your mind, as you stated here, that he was in that bad shape, you have never referred him to a specialist in that field, have you?

A. I referred him to Dr. Paul Jarrett as I told you a moment ago.

Q. And Dr. Paul Jarrett examined him once?

A. I think so. That's the only report I received from Dr. Jarrett. I don't know how many times he went back to Dr. Jarrett.

Q. You don't know whether he received any treatment from Dr. Jarrett, or not. Is that correct?

A. I don't know whether Dr. Jarrett treated him. I think Dr. Jarrett did another electroencephalogram on him, made arrangements to have some more psychometric tests done; and after that I don't know what other contact he had with him.

Q. Now your speciality, Doctor, is that of a neuro surgeon, is it not?

A. That's true.

Q. In other words, your speciality is that of examining and searching out for organic disturbances. Is that correct?

A. Yes. Our field of neuro surgery, if you confine it to just neuro surgery, we are primarily interested in those diseases that can be benefited by operation; but we don't confine our work merely to neuro surgery. You have to find these cases from somewhere, and therefore, in the process of finding them we do a lot of neurology and are frequently engaged in psychiatric determinations to try to determine whether or not this patient has anything of an organic nature, or whether it is highly emotional, which is frequently a problem, so we engage in the diagnosis of these conditions.

Q. And you determined on every examination that he did not have any organic symptom. Isn't that right?

A. Yes, I did. We were supporting him, and reassuring him in regard to his head injury, which he felt had been severe. Of course, being neuro surgeons, we are primarily engaged or frequently engaged in taking care of people that have symptoms following head injuries.

Q. But a psychiatrist, Doctor, would be better qualified to treat a man who has purely a psychiatric condition, which I believe this man has, would he not, than you, sir?

A. I don't think this case needed any other treatment than I was giving him, even though I had referred him to Dr. Jarrett. I think he saw him only a few times, and he preferred to be returned to me. That's a personal type of relationship that is difficult to control. Some patients like to come back and see you, even though you have referred them to somebody else.

Q. You don't feel then, as I understand it, Doctor, that he needed the treatment of a psychiatrist,—a man specialized in that field?

A. I think he needs the treatment of a psychiatrist right now.

Q. You never recommended that to him, did you, for treatment?

A. I sent him to Dr. Paul Jarrett.

Q. And there was one examination, I understand?

A. I don't know how many times he went there. I think he went back more than once. I have only one report.

Q. He didn't find him disabled, did he?

A. He continued to evaluate him. I have no report from Dr. Jarrett. I have a report of his initial examination in which he requested psychometric testing. I do not have his conclusion after his evaluation of those tests. I don't know what he found.

Q. In other words, you treated this man for three years, but you do not have the conclusions from the psychiatrist to whom you referred him for examination. Is that correct?

A. That's right.

Mr. Carey:

I think that's all.

Re-Direct Examination.

(By Mr. Sams):

Q. Dr. Keedy, Dr. Jarrett is a psychiatrist, is he not?

A. That's right.

Q. Did you also receive a report from Dr. LeDrew?

A. I did. I sent my entire file over to him at his request when he was to evaluate the patient.

Q. Did you discuss the treatment that you were giving or carrying out with Dr. Stokes, to Dr. Le Drew and to Dr. Jarrett?

Mr. Carey:

I object to that, and Dr. LeDrew has already testified for the benefit of the jury.

The Court:

What is the purport of this question?

Mr. Sams:

I want to show that this Doctor's treatment,—that they knew what this Doctor was doing, and were in accord with it.

Mr. Carey:

That's objected to.

The Court:

That would elicit the consultation again. He has already testified that in his opinion his treatment was adequate, and it was not necessary for him to refer him to somebody else.

Mr. Sams:

No further questions.

Re-Cross Examination.

(By Mr. Carey):

Q. Doctor, I hand you this report to the North Western Mutual Life, and ask you if that is your signature at the foot of it?

A. Yes.

Mr. Carey:

That's all.

(By Mr. Sams):

Q. Your opinion at this time, is it any ditterent in so far as total disability was concerned, at the time when you filled out that report?

A. I didn't get that.

Q. Has your opinion changed since you filled out that report, or is your opinion the same today in so far as total physical disability is concerned?

A. I don't think my opinion has changed any. My opinion has been the same. It is the interpretation of what disability is, and what disability meant. That seems to be the problem, and I have answered this here, "That the patient will have considerable permanent residual disability," in reference to question No. 9, when they ask, "What in your opinion are the prospects for recovery?" And question No. 7, "Is the insured now totally disabled?" I said, "No," which he isn't totally physically disabled. Even now he is not, and that's my interpretation.

The Court:
Is that totally physically disabled, or totally disabled?

The Witness:
It says, "Is insured now totally disabled?" It says nothing about physically.

The Court:
I think the Doctor has explained that.

Mr. Sams:
That's all I have, Doctor.

(Thereupon the instrument was marked as Defendant's Exhibit 4 for identification.)

Mr. Sams:
The Plaintiff rests, if Your Honor please.

The Court:
All right. The jury will be excused momentarily.

(Thereupon the jury retired from the Courtroom, at which time the following proceedings were had.)

The Court:
Do you have a motion?

Mr. Carey:
Yes, sir. May it please the Court, the defendant at this time, at the close of the Plaintiff's evidence, respectfully moves the Court to grant a directed verdict in favor of the defendant, and for its reasons, states: One, the plaintiff has failed to prove a prima facie case. Two, it is clear from the evidence that the Plaintiff has failed to prove he was disabled by bodily injury or by sickness so as to suffer total loss of all of his business time. Three, a verdict in favor of the plaintiff would be contrary to the facts and the weight of the evidence, and unfounded by the evidence.

The Court:
The motion will be denied.

Mr. Carey:
If the Court please, I should like to move to strike all evidence with respect to a heart condition, or alleged heart condition,—heart attack, in view of the statement of counsel for the plaintiff that they make no contention now that the man was disabled by reason of any heart condition. I feel that the record has been cluttered up, and that they have taken one position at the outset, and have now jumped to an entirely different ground.

The Court:

I am inclined to instruct the jury that they should not consider any evidence of a heart attack as causing any disability, but they may consider a heart condition of the man, if one exists, in their opinion, as bearing upon the question as to whether or not he is permanently disabled.

(Discussion off the record.)

The Court:

I think you need to amend your Complaint to conform to the proof.

Mr. Sams:

All right, sir.

Mr. Carey:

I wish to make an offer in view of Your Honor's ruling on, I believe, at least two motions during the trial, with respect to the existence of other Policies. I wish to make an offer of proof by Dr. Stokes, as an adverse witness, that he had in existence five Policies, at least five Policies, which would be affected definitely by an adjudication of the claim that he was totally disabled, and as affecting his willingness to confine symptoms, so he built up a case within the realm of his knowledge as to how to do so as a psychiatrist, and that would affect his credibility. And I believe the evidence is most pertinent in this case, and the jury is entitled to know that there were those five Policies. One of them was a Life Policy on which the premiums would be waived in the event of total disability, and three of them were Accident and Health Policies, and one of them, I believe, is a

straight Accident Policy. And I think it is material at this juncture.

(Discussion off the record.)

The Court:

In view of the turn of this case, it might be that he is feigning this particular mental condition, and I think in honesty to you you should be permitted to ask him how many claims he made for total disability. Counsel can ask him how many have been rejected, and how many have been accepted, without going into the details. If I were you, I wouldn't go into it.

Mr. Carey:

I don't think I will if that is Your Honor's ruling.

(Thereupon the jury returned to the Courtroom, at which time the following proceedings were had.)

Mr. Carey:

We should like to read into the record the deposition of Dr. Woodford Troutman taken on July 25, 1955. Mr. Dixon, who represented another defendant in another suit—

Mr. Sams:

I object to that being read, Your Honor.

The Court:

Yes. It wasn't taken in this suit, was it?

Mr. Carey:

It was stipulated that the deposition would apply to all of the cases.

(Discussion off the record.)

The Court:

I think we would be wasting time.

Mr. Carey:

All right, sir. There is some cross examination. I am willing to waive it if you will.

Mr. Sams:

I don't care anything about it.

Mr. Carey:

All right, sir. If you have no objection, we can cut this short at this point.

Mr. Sams:

Yes, all right.

Thereupon, RICHARD E. STRAIN, was called as a witness on behalf of the defendant, and having first been duly sworn, was examined, and testified as follows:

Direct Examination.

(By Mr. Carey):

Q. Will you state your name, please?

A. Richard E. Strain

Q. What is your occupation?

A. I am a licensed Doctor of medicine, specializing in surgery of the nervous system.

Q. Would you mind stating briefly for us, sir, your qualifications as a specialist in your field?

A. I graduated from Vanderbilt University Medical School in 1935, and had an internship and assistant

residency in surgery at Stamford University Hospital; and then went to China where I spent two years in Lan-chow China General Hospital in charge of surgery there. I returned to this country, and then went to Bombay University where I taught surgery for three years, and then returned to this country and was on the surgical staff and taught at Vanderbilt University Medical School for four years. I then went to Boston where I had a Fellowship and assistant residency and residency in neuro surgery at Boston City Hospital. Had a year and half Fellowship in neuro surgery at the Lehigh Clinic. I am certified by the American Board of Neurological Surgery and a member of various Associations.

Q. And I take it that you are on the staff of various and sundry Hospitals around this area?

A. Yes, sir.

Q. Did you as Court-appointed physician examine a man by the name of Dr. Edgar Stokes?

A. Yes, sir.

Q. Was that examination on January 13, 1956?

A. Yes, sir.

Q. Would you tell the jury, sir, what examination you performed on this man, and what your findings were, and your conclusions?

A. At the time I saw him he was complaining of being nervous and having headaches. He gave a history that he had been involved in an automobile accident on February 20, 1952, at which time he was thrown out of his car, and he said that he came to in some water, the accident having occurred near Clewiston. He said he was unconscious at the time, and when he came to his head was out of the water. He was in about four feet of water. He said his right little finger bled some, and he had a bump on the

left side of his head. He was taken to a Hospital in Clewiston, and he said that at that time he was told he had a hematoma or small blood clot on his abdomen. He did not remember the name of the Doctor who saw him in Clewiston, and he says he had considerable pain in his left leg. He was then transferred to the Broward General Hospital where he remained for a week under the care of Dr. Patterson and Dr. Taylor. He states that he has been seen at intervals since that time by Dr. Keedy who first saw him in 1953 because of his nervousness and headaches. He had an electroencaphalogram or brain wave test done at the University of Miami. He said that at this time if he was quiet he would not have headaches, but if he gets nervous and upset he would have headaches that came practically every day. These are all over his head with no particular localization. He states he has to use aspirin for these which helps to relieve it some. He has not worked since the accident. When I asked him how he passed the time of day he said he would read the paper, and wash the dishes, and clutter around, more or less. He said he had had an attack of angina in 1945, and that in 1946 he had had a coronary occlusion. In addition he told me that he had had a hematuria, which is passing blood in the urine. He had been cystoscoped seven times. His blood pressure was 120/80. He was a nervous and voluble man. He talked a good deal. In moving his neck all the back motions were freely made and fully made, but he complained his neck hurt when he made extreme motions. In examining his cranial nerves I could find no abnormality. The pupils were equal. His visual fields were full and there was no visual weakness. The cranial nerves all functioned normally.

Q. Would you explain to the jury the significance of what you have just stated as to the examination of the cranial nerves, the pupils being equal, and so forth; what is the significance of that?

A. We divide a neurological examination into several parts. Part of the examination is concerned with the cranial nerves. If people have signs of a blood clot, or they have had severe damage to the brain in which some of the nerves go to the cranial nerves of the brain have been damaged. There may be atrophy in the eyes themselves, or swelling in the nerve root. There may be some facial weakness on one side. All of these tests done to his cranial nerves were normal.

Q. What were you looking for in that particular kind of test?

A. A patient who has had a head injury, we look for some paralysis of some of the cranial nerves. There was no paralysis of his cranial nerves. Sometimes we find a pupil larger on one side than another, which may indicate a blood clot at times, or paralysis of the nerves of the eye. We found nothing there in this examination to suggest any injury there.

Q. All right. Would you go on?

A. The motor system examination or examination of the system that primarily moves the arms and legs, and different parts of the body, we examined the motor system for any weaknesses of the arms and legs for any paralysis of the arms and legs or muscles, or whether there be any atrophy of the muscles from injury; and the motor system examination was within normal limits. We examined the sensory system, which is the system concerned with the ability to feel a pin prick, touch, vibration, and we move the arms and toes and fingers in different posi-

tions to see if the sensory examination is properly performed. He had no abnormality in the sensory examination.

Q. Doctor, what would you be looking for in making such an examination?

A. Some people in head injuries, they may show a loss of ability to appreciate the form of objects that they feel, so we write numbers on their skin, and if they cannot appreciate that, that's a form of test that shows there has been damage to the lobe of the brain, and the patient may not appreciate the forms of objects that he feels. It may be loss of vibratory sense which we test with a tuning fork. All of these examinations are done to test the function of the brain and nerves. His tests were within normal limits. Then next we do what we call a cerebellum test which involves the portion of the brain at the back part of the head that is concerned with balance, for one thing. It is concerned with the inner movement so the movements can be co-ordinated and made purposefully without rough or jerking movements; and his cerebellum tests were all performed normally. Then the last part of the examination is the testing of the reflexes. We test the reflexes in the arms and legs, to see if there has been any interference with the nerves that go to the arms and legs or brain damage. His reflexes were within normal limit.

Q. Doctor, if some of these signs were positive, what would that indicate?

A. If these signs are positive it would indicate some form of mis-function, due to injury. In these instances we found no mis-function so far as these tests were concerned.

Q. In your examination were there any findings of any objective symptoms or any organic disturbances in this connection?

A. No, sir. All his neurological examination was within normal limits.

Q. What were your conclusions, then, with respect to this patient from your examination as a specialist in your field neuro surgery?

A. This man now complained of headaches, being nervous following an injury, and his examination neurologically was within normal limits. I felt that the headaches that he complained of were produced by the trauma that he complained of that he had suffered, but there was no sign of any serious damage to his brain, nor to the nerves, from that examination.

Q. Were there any findings in your entire examination, Doctor, other than his subjective complaints, that is, the subjective symptoms,—things that he talked about or complained about?

A. No, sir. This examination was completely normal so far as the neurological examination was concerned.

Mr. Carey:

You may cross examine.

Cross Examination.

(By Mr. Sams):

Q. Doctor, how long did your examination last, approximately?

A. I didn't time it.

Q. An hour?

A. I would say it took a little longer in this instance than usual.

Q. He is rather a rambling individual in attempting to get a history from, isn't he?

A. Yes.

Q. You say "voluble" in your report?

A. Yes.

Q. It is kind of difficult to get facts straight from him, isn't it?

A. Yes, sir.

Q. Did you make any effort to evaluate him on a psychiatric basis?

A. No, sir.

Q. You restricted your statement solely to the field of his actual motor functions from a neurological standpoint?

A. Yes, sir.

Mr. Sams:

That's all I have, Doctor. Thank you very much.

Re-Direct Examination.

(By Mr. Carey):

Q. Your reason for not attempting to evaluate the psychiatric functions, Doctor, is that because that's in a separate field of specialization?

A. Yes, sir. I am not a psychiatrist.

Q. What is the field of specialization of Doctors who would be expected to take care of a man if he were found to be psychotic or have psychotic tendencies?

A. Well, I think that would fall within the realm of a psychiatrist.

Mr. Carey:

That's all. Thank you, Doctor.

Mr. Sams:

Doctor, just a few questions along that line.

Re-Cross Examination.

(By Mr. Sams):

Q. Doctor, do you know Dr. Frederick LeDrew?

A. Yes.

Mr. Carey:

I object, if the Court please, as being irrelevant and immaterial.

The Court:

I sustain the objection.

(By Mr. Sams):

Q. Sir, isn't it true that in the field of neuro surgery many times you are called upon to treat people who are suffering from psychotic tendencies?

A. Well, we do lobotomies on people who have psychiatric troubles, but we do that after a psychiatrist has felt it was indicated and should be done.

Q. That is a brain operation that is done on people who are sometimes psychoneurotic and sometimes suffering from a great deal of pain?

A. Yes, sir.

Q. And sometimes your diagnosis along with the psychiatrist's diagnosis—

A. We usually accept their diagnosis and perform the surgery.

Q. I am talking about in the treatment of nervous disorders the field sometimes over-laps, does it not?

A. I would say that with psychotic patients we listen to the psychiatrist. Everybody is nervous at times whether they are sick or well. You cannot eliminate nervousness from all patients. People who come to us with a brain tumor are nervous, and we

try to treat the nervousness by removing the brain tumor, or assuring them that their trouble is not serious if they think they have a brain tumor and don't have it. That's the way we treat that nervousness.

Q. Do you have patients, Doctor, that you treat who have psycho neurosis or who are psycho neurotic that you are treating in conjunction with some pshyciatric advice besides your treatment?

A. I would say that the people that we see who are psycho neurotic, we don't actually treat their psycho neurosis except to assure these people that they have no serious organic trouble. We think that many of the people we see, that we could classify as psychoneurotics, or neurotics, in the sense that they fear, and may have just cause to fear that they harbor some serious disease that we should be treating if they had it. A man who is hit in the head may feel his changes are all secondary to a blood clot pressing on his brain, and we can treat his psycho neurosis by proving to him or to our satisfaction that he was not having a blood clot. If we can get him to accept that fact then he will improve without any particular treatment.

Q. In other words, that's a theraputic proposition that the neuro surgeon does in saying "You really have nothing wrong with your head. You are perfectly normal. Don't worry about that"?

A. Yes.

Mr. Carey:

You may step down, Doctor. Thank you very much.

(Thereupon Court adjourned until 1.45 p.m., of the same day, at which time, counsel waiving polling of the jury, the following proceedings were had.)

Thereupon, FRANZ H. STEWART, was called as a witness on behalf of the Defendant, and having first been duly sworn, was examined, and testified as follows.

Direct Examination.

(By Mr. Carey):

Q. Will you state your name, please?

A. Franz H. Stewart.

Q. Doctor, where do you have your office?

A. In the duPont Building, Miami, Florida.

Q. Do you have a specialty, sir, in your practice?

A. My speciality is that of internal medicine with an interest, among other things, in cardiographic work.

Q. Will you tell the jury of your medical background and particularly what specialization you have had in the field of heart diseases?

A. I graduated from Emery University Medical School in Atlanta, and then I taught for a short time in Medical School at Columbia, and then I took my post graduate work there for a year or two, arriving here to practice the specialty of internal medicine in 1935. I have worked through the heart clinics in this area ever since. I have served as President of the Heart Association here. I am a member of the American Board of Internal Medicine, the American College of Biology, the American Federation of Clinical Research, the American College of Physicians. The work here in Hospitals has always been in medicine, particularly cardiovascular diseases, but not exclusively. I served for two years at the Chief of Staff at Mercy Hospital, four years at the Variety of Children's Hospital, as Director of the Department of Med-

icine, and for three years as the Director of the Department of Medicine at Jackson. The last year as the Director and Chairman of the Medical School—

Q. Was that at the University of Miami?

A. Yes, sir.

Q. In your experience that you have just related to us, have you on many, many occasions had occasion to take and interpret electrocardiagrams?

A. As part of the routine daily work for the past 20 years.

Mr. Sams:

I would like at this time to interpose an objection to this Doctor's testimony. It is my understanding that this Doctor has never seen the plaintiff, and I presume he is only going to testify from somebody else's records.

The Court:

Let's don't presume. Let's find out.

Mr. Carey:

I will readily admit he has never examined Dr. Stokes, and the purpose of his testifying today will on a hypothetical question be to examine the Hospital records which are admitted into evidence and the electrocardiagram and tracings which are admitted into evidence, and to give us his interpretation of those electrocardiagrams and tracings.

The Court:

Proceed.

Mr. Sams:

I object because that is the same thing I was prohibited from doing on the interpretation of the psychometric tests.

The Court:

No. They weren't before us. These are before us. I didn't prohibit you from bringing in records and having them interpreted. I think I made myself clear. If I didn't I apologise.

Mr. Sams:

All right, sir.

(By Mr. Carey):

Q. Doctor, I have shown you the Hospital record of an individual by the name of Dr. Edgar W. Stokes, and a number of electrocardiographic tracings, and discussed them with you, have I not?

A. Yes.

Q. Now, Doctor, assume, if you will, a man of the age of 56, who has for many years practiced as a psychiatrist, and who since approximately 1951 has not been in the active practice, who had a great number of electrocardiographic tracings taken; and assume that this patient relates that he was in an automobile accident on February 26, 1952, and sustained certain injuries, and he alleges that he sustained, among other things, a bruise to the forehead, phlebitis, and injuries to the scrotum and penis hematoma,—assume, Doctor, that this patient on May 24, 1954, was admitted to the North Broward Hospital, and that he had the laboratory findings which are shown in those records, and that electrocardiographic tracings were taken of him, which appear in those records; assume further, Doctor, that on May 29, 1946, electrocardiographic tracings were taken by Dr. Woodford B. Troutman, as shown by Plaintiff's Exhibit 8, which I now hand you; and that an electrocardiographic tracing was taken on September 12,

1952, Plaintiff's Exhibit 5, which I now hand you; and a further electrocardiogram, March 26, 1953, being Plaintiff's Exhibit 6, which I now hand; a further electrocardiogram taken March 26, 1953, Plaintiff's Exhibit 7, which I now hand you; and an additional one on May 24, 1954, being Plaintiff's Exhibit 4, which I now hand you; and a further electrocardiogram, being dated October 4, 1954, being Plaintiff's Exhibit 9, which I now hand you. Now Doctor, with that assumption, that patient, and the records shown, will you examine the records and the electrocardiographic tracings, and read and interpret them to the jury, if you will. Relate to them your findings, if any?

A. I'd like to, if I may, discuss these electrocardiograms as we go along.

Q. Excuse me, Doctor, but I don't think I handed you the original Hospital records. This is the one that is in evidence, being Plaintiff's Exhibit 1. I am sorry.

A. As I read these I would like to state that an electrocardiogram is a test which shows you certain electrical impulses which are created in the heart, and that often these impulses will give you quite definite information. It isn't the whole story. As I look at the one of May, 1946, I see nothing which is in any way definite to tell me that there is or is not heart damage. There is the slightest failure of part of the waves to be completely normal to one of the leads in 1946. Again, not enough to say, on the basis of this alone, that there is or is not anything wrong with the individual, because of the difficulty of the test itself. There was nothing definitive in that test. The one on September 12, 1952, I would say is entirely normal. The one on March 26, 1953, each lead is there,—not each lead is there, but those that are present I would say are equally normal; and I notice

on this day the next one says, "After exercise tolerance."

Q. Would you explain the significance of that, Doctor?

A. Of course, I don't know just exactly how this test was done, but I assume it was done in the usual fashion; that they took an electrocardiogram first, and finding it normal, decided to put the individual through some work. The usual work is walking up and down a little stairway which is two steps tall, and you walk so many steps according to your age, and your weight, and then we see whether the electrocardiogram was taken after,—whether the electrocardiogram taken after shows any evidence of stress or damage to the heart muscles, which did not show when the heart was at rest; and I would say that the changes seen here after exercise are so slight as to be entirely within the normal response.

Mr. Sams:

What was the date of that?

The Witness:

March 26, 1953. I am holding out here the record I just read of September, 1952, with the idea of comparing it with one of the later ones to see if they are alike or if they are different. Here is May 24, 1954. Again we see a little change. For your information, in leads 2 and in leads a, b, f, which are the electrical leads we are talking about, there are little defects here, again not completely definitive, but just enough to say, "Look further". Now let's go back, if I may, and compare that with the earlier one: It isn't identical to the one I spoke of as being slightly different in 1946. That's May 24, 1954,—nothing which

makes me be able to tell you this shows evidence of damage, but I cannot say it is entirely normal, and we often find such a question when we read these electrocardiograms. That was May. Now into October, 1954.

Q. Would you explain that last remark, Doctor. There are some electrocardiographic changes which represent changes, but which may or may not be representative of anything significant from a cario standpoint?

A. Yes. An electrocardiogram, surprising as it may seem, certain of these little changes come about from such things as being chilly. For example, a glass of ice water. I don't mean to imply that happened here, but a glass of ice water could give you little changes like that which would make you of necessity take another one, to decide was there something wrong, or was there not. I certainly would have taken another one.

Q. Another electrocardiogram?

A. Yes. A few hours, or perhaps a day later to see whether this was a significant defect, or whether it was just one of these transient unexplained changes which we see as a normal variation. I can't tell you that.

Q. And if there were another one taken, Doctor, within a couple of days following, which was completely normal, and within normal limits, what would you say then as to the significance of the one on May 24 of 1954?

A. Unless it showed some change which suggested a process or a condition which was progressing or changing, or getting better, we would have to say that this was a change completely unexplained, and unless there was some other information found, you couldn't place significance on it.

Q. I think that's clear to the jury. Just go ahead, Doctor, and analyze the others for us?

A. This is October 4, 1954. This one is normal. I would say, unequivocably.

Q. Doctor, getting back to the one of May 24, 1954, for a moment, the attending physician, Doctor, testified that he took numerous electrocardiograms following May 24, 1954, and beginning within a day or so after, and that there were numerous ones taken before, and that the only one in his opinion that showed any abnormality was May 24, 1954, what would then be your opinion with respect to the significance of that one of May 24, 1954? All others being normal, both before and after?

A. I think we would have to conclude that the most reasonable thing is that the electrocardiogram itself, one isolated tracing with normal ones before, and normal ones afterwards, could not alone be taken as evidence that a heart attack had occurred; but at the same time, if this individual was sick, and for other reasons the Doctor thought it was, he would be justified, I think, in playing safe, but it would be extremely unlikely for him to have such an attack and not show in the cardiograph, so I would say that you would have to leave this particular one under those circumstances as a question mark, and I couldn't answer what happened.

Q. Will you go ahead with your analysis of the later series?

A. Perhaps it would be interesting to compare these two that were abnormal with different dates.

Q. Anything that you can do for us, Doctor, to come to a conclusion as to whether these electrocardiographic tracings taken in a series are diagnostic for you to give you any definite result?

A. Well,—

Mr. Sams:

I'd like to interpose an objection to the form of the question and to the type of question, "Anything you can do."

The Court:

I will sustain that objection.

(By Mr. Carey):

Q. Would you explain to the jury the value of having a series of electrocardiograms rather than an isolated one?

A. Indeed. One single elctrocardiogram can, if it shows certain changes, tell you this man has had a heart attack. It cannot tell you when he had it. Now unfortunately, even in the presence of a heart attack, one single tracing may not show it. You need two or three over a period of time, and when those are taken over a period of time, sometimes for several days at a time, you can almost always, but not always, get good evidence that this man has had an attack, or that he hasn't. The one tracing will rarely give you the answer to that, so a series or sequence of tracings gives you the story. In other words, as a heart attack begins, there will usually be certain changes in the electrocardiogram which suggest that something is beginning, and then the next day, or perhaps a few days later, the electrocardiogram will look different, and taken in comparison with the first one, will give you good evidence that something is going on. There is a change actually taking place while you are taking them; and sometimes it takes several weeks, and sometimes even months for that sequence of normal changes,—by "normal", I mean accepted in the condition, changes to come about or

evolve. Therefore, a sequence of tracings is immensely valuable; and the sequence here does not show, in my opinion, evidence which suggests or tell us that number one started and progressed to number two, and went on to number three, and on down. I use those numbers to indicate changing conditions. I don't mean exact number one, and number two and number three. That I do not see in these tracings.

Q. Is there anything, Doctor, then, in these tracings taken as a series which would enable you to come to a conclusion as a specialist that there is evidence of a coronary condition?

A. One reason that I think we can pay slightly less attention to these two possibly abnormal tracings is that, number one, there is such a tracing in 1946. I think they were before, or, at least, after tracings being normal; and here we see one in 1954 with a change which may or may not be significant, and I am told later ones are normal. For those reasons, I can't find, on the basis of electrocardiogram, the ones I have seen, enough to make me form a reasonable opinion that we have evidence of heart disease. I should say these are not definite evidence of heart disease. The electrocardiogram, as I said, is not the whole story. I haven't seen the Doctor.

Q. Doctor, in your experience, do you come to the conclusion that there is such a thing as a coronary type, referring to types of individuals?

A. There has been a lot written on that, and I have tried very hard to think so. I do not think there is. If there is, I can't recognize it. I have seen it in every type I can think of. It sure would be nice if that were true.

Mr. Carey:

You may cross examine.

Cross Examination.

(By Mr. Sams):

Q. Referring first to the electrocardiogram by Dr. Troutman in 1946. I think that's a photostatic copy. I want to ask you this, and ask you if you would agree with it in so far as that electrocardiogram is concerned. Lead one. I presume there are four leads there, aren't there, Doctor?

A. That's correct.

Q. Lead one. The T waves are flat. In lead two there is some notching and slurring of the RS segments. In lead three, a prominent and notched S wave; and in lead four f, the T waves again show flat. The tracing of 1946 shows some abnormality of the T waves in leads one and four, which are not diagnostic, but might suggest some cardiac damage present at that time?

A. The final conclusion, of course, is almost, I believe, what we said,—it could, or could not be someting.

Q. You wouldn't disagree with that, Doctor, would you?

Mr. Carey:

Let the Doctor finish his answer.

The Witness:

I wanted to see if I agreed with the description too. I agree with what is being said, that the T wave is rather small in lead one, but I find that it is rather small throughout this tracing, and when one is going

to measure the size of a T wave, which is an electrical measurement of an electrical potential, and you see that same thing throughout all four tracings, it raises the question was the standard decision correct, or the tracing technically correct. In other words, if a thousandth of a volt is sent through this instrument, does it measure the right jump that a thousandth of a volt should measure, and unfortunately, on this record, the custom of showing what a thousandth of a volt would show, does not appear, so there is no way for me to judge whether or not the height of these waves, and all of them are depressed, more or less,—whether that is a technical defect, or whether, in fact, they are all depressed. I don't believe that the T wave in one is particularly depressed. I do think it is in lead 4f, and I think that's the most questionable feature. The slurring that you mentioned in QRS in lead two, is, I think, entirely because that is a small QRS, and it is usually slurred when it is small, and it is of no significance whatsoever. The deep S wave in lead three I do not think is of any significance as far as heart disease is concerned, because that is simply a reversal of the findings which is in lead one, and which has to do with the position of the heart and chest, and that is in no sense, heart disease. I still agree with you that there is a question in lead four f. that may or may not be something.

Q. And the same thing would be true of the one you spoke about on May 24th? That's the second one you spoke of?

A. Yes.

Q. In other words, that's a matter of interpretation; and a great deal would also depend, as I under-

stand from your testimony on any other condition that the man might have had?

A. Of course.

Q. If you had observed him at that time, and saw him to be a person that looked to be in shock, a person who was complaining of a chest pain, who had an elevated sedimentation rate, an elevated blood count, a low grade fever, all those things would go into your consideration in making some determination as to whether or not there had been some cardiol damage?

A. Yes. We would want every bit of information available, and every bit of it would be considered very seriously.

Q. And as I understand your testimony now it is literally impossible for you from just those alone to make any definite statement about whether there is, or isn't?

A. Of course. All I can say is that this does not give us definite information that there was.

Q. You have never seen Dr. Stokes and examined him?

A. No, not to my knowledge.

Q. Have you examined these records before?

A. Yes, sir.

Q. In your office?

A. Photostat copies, I believe.

Q. You have just been employed by the Continental Assurance Company to come over and interpret these and testify here today?

A. I didn't know that.

Q. You are not expecting me to pay you, are you, Doctor?

A. No, sir. I came at Mr. Carey's request.

Q. He represents the Continental Assurance Company?

A. Thank you.

Q. And I presume they are going to pay you?

A. Thanks again. I hope so.

Q. I hope so too, Doctor.

A. I don't have any doubt about that.

Mr. Sams:
That's all.

Mr. Carey:
Thank you, Doctor. That's all. I would like at this time to offer into evidence Defendant's Exhibits 3 and 4 heretofore marked for identification. Any objection?

Mr. Sams:
I have a request, Your Honor. He says he has no more witnesses. I'd like to argue this.

The Court:
All right. The jury will be excused.

(Thereupon the jury retired from the Courtroom, at which time the following proceedings were had.)

The Court:
These are the records, are they not?

Mr. Carey:
Yes, sir. They have been identified; one by Dr. Stokes, and the other one by Dr. Keedy.

Mr. Sams:

We have no objection to stipulating as to what they say, and what the effect of them is. The objection is to the forms that they are on, one from North Western, and one from the Continental Casualty Company.

The Court:

I assume we could blank it out.

(Discussion off the record.)

Mr. Carey:

I have nothing else to offer.

The Court:

Do you have any other witnesses?

Mr. Sams:

No, sir.

Mr. Carey:

May the record show that inasmuch as plaintiff's counsel has objected to the admission into evidence of defendant's exhibits 3 and 4 for identification for the reason that they both are forms of other Companies, the suggestion has been made that we cut off the names that are on the top of the forms, and that the Clerk identify the tops of these forms so that later, if necessary, they may be put together again for such other uses as may be needed.

The Court:

Mr. Clerk, mark the exhibits, and mark the tops as the same exhibits, and put your initials thereon.

(Thereupon the Exhibits were marked accordingly.)

Mr. Carey:

It is understood that the Court give us leave to withdraw the tops of defendant's exhibits 3 and 4?

The Court:

Leave is granted.

Mr. Sams:

I am not clear on the status of the counterclaim. I move, for the record, to strike the counterclaim on the ground that there has been no proof.

The Court:

He said at the onset he was withdrawing that.

(Discussion off the record.)

Mr. Carey:

I was agreeable to withdrawing the counterclaim from the consideration of the jury because after the jury's verdict and findings are in, I believe it is within the province of the Court to decide on the counterclaim, and the merits of it, which has been filed by the Defendant Company.

The Court:

Let the record show that the Court will consider the jury's verdict on the matter of declaratory judgment and decree, and counsel agree that the motions which would normally be made after announcing before the jury that both sides rest, will now be made and determined.

Mr. Carey:

May it please the Court, the defendant respectfully moves the Court at the end of all the evidence in the

case, to grant a directed verdict in favor of the defendant, and for its reasons, states: One, the plaintiff has failed to prove his case by a preponderance of the evidence. Two, a verdict in favor of the plaintiff would be contrary to the weight of the evidence. Three, a verdict in favor of the plaintiff would be contrary to the law applicable to the case. Four, the plaintiff has failed to prove by a preponderance of the evidence that he has become totally disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time so as to recover any sums of money in addition to that already paid him to September 10, 1952.

The Court:

That motion will be denied. Now is there an amendment to the Complaint?

Mr. Sams:

I filed that, Judge.

The Court:

Serve a copy on counsel.

Mr. Carey:

I wish at this time to present this motion on behalf of the defendant. The defendant requests the Court to present, pursuant to Rule 49,—to submit to the jury the attached interrogatories, and require the jury to return special written findings by giving their answers in writing thereto, and have attached to this motion a copy of the interrogatorties, and I submit to the Court the motion, and an original of the interrogatories which I propose be given to the jury with instructions that they answer same.

(After a discussion, the following proceedings were had.)

The Court:

Now for the instructions.

Mr. Carey:

This instruction is argumentative and very misleading, and would be prejudicial error against the defendant. That's instruction No. 1 of the plaintiff. We are not talking in this case of any alleged violation of a Policy in the first place. We are merely discussing whether or not the plaintiff's condition brought him within—

The Court:

Wait a minute. There is an instruction somewhere on interpretation. Listen to this. "The Court instructs you that if the language of the Insurance Contract is plain and not ambiguous, then you should follow that language. On the other hand, if there is some uncertainty in the meaning of the Contract of Insurance, you should consider it strictly in favor of the insured."

Mr. Carey:

I would object to that, if the Court please. I think that there is no uncertainty,—that the Policy is clear. We are not talking about a violation of the Policy. We have raised no defense to that.

The Court:

I think it is clear too. I think it would be reversible error.

Mr. Goldman:

There is a dispute which has gone through this trial as to what is meant by loss of business time.

The Court:

I will instruct on that. "I charge you that 'business time' in a Policy insuring against loss of 'business time' caused by accidental injury or sickness, refers to time lost from the occupation in which the insured was engaged at the time disability was sustained, or the time lost from some other occupation in which the insured might have been able to have been engaged within the range of his normal ability, taking into consideration his education, training and work, and his physical and mental condition."

Mr. Carey:

I have no objection to the charge which Your Honor has just read as a proposed jury charge.

The Court:

We are sure of that charge because that has been approved.

Mr. Goldman:

The very cases that Your Honor pointed out to me as a result of our conference the other day, point out that the burden is on the Insurance Company to show what other occupation than the one the man is in, he could do; and there hasn't been one bit of evidence in here by the Insurance Company that Mr. Stokes could wash windows or teach school, or anything. There isn't any evidence.

The Court:

He said he might have engaged in the real estate business.

Mr. Carey:

The jury is entitled to draw from all of the evidence whether could engage in other occupations.

The Court:

You are correct, counsel. The burden is on them, when they come to argue the matter, as to whether or not it has been established one way or the other.

Mr. Carey:

What we would like is a charge on the burden of proof.

The Court:

It is on the plaintiff, and this Circuit has been very diligent about knocking out cases where I said the burden was somewhere else. What they mean by that in the decisions is that on appeal the burden is on them to show there was some miscarriage. Let's read this other one. "Should you find from a preponderance of the evidence that the plaintiff, as a result of injury or sickness as described in the Complairt as amended, was totally disabled by bodily injury or sickness during the period commencing September 10, 1952, through and including January 26, 1956, from engaging in his occupation as a physician, or engaging in any occupation in which he was able, taking into consideration his education, training and work, and his physical and mental condition, then you will find for the Plaintiff and assess his damages at the rate of $150.00 per month for such months, if any, that you find him to have been so disabled."

Mr. Goldman:
That would be plus interest.

Mr. Carey:
I think the interest factor would be a very confusing thing to submit to the jury, and should be left out.

The Court:
Do you want to stipulate that I can compute the interest?

Mr. Sams:
That's fine with me, Judge. We have an Accountant's computation here.

Mr. Carey:
I don't think that stipulation should be mentioned to the jury, Your Honor.

The Court:
No.

Mr. Sams:
The only problem there is I gave the figure in my opening statement, plus interest.

Mr. Carey:
Perhaps the jury charge should say, "without interest."

Mr. Sams:
I won't say anything about interest.

The Court:
Listen to this. "Should you find from a preponderance of the evidence that the Plaintiff, as a result of

injury, disability or sickness, described in the Complaint as amended."

Mr. Carey:
"Injury or sickness."

The Court:
"Injury or sickness."

Mr. Carey:
Yes, sir.

The Court:
All right. That would be better. "Injury or sickness as described in the Complaint as amended, was totally disabled by bodily injury or sickness during the period commencing September 10, 1952, through and including January 26, 1956, from engaging in his occupation as a physician, or engaging in any occupation in which he was able, taking into consideration his education, training and work, and his physical and mental condition, then you will find for the Plaintiff and assess his damages at the rate of $150.00 per month for such months, if any, that you find him to have been so disabled."

Mr. Carey:
If you use the word, "damages",—they are not damages in any sense.

The Court:
Damages would mean the same thing. In law it would be damages. Damages for breach of contract.

Mr. Carey:
Not necessarily. Indemnity as provided in the Contract. We don't mean to quibble about it.

The Court:

"Disability from performing an occupation, as used in these instructions, means, substantial or practical inability to do those substantial and material acts and duties characterising and pertaining to the occupation, and necessary to the carrying on of the occupation, whether it be the occupation in which the Plaintiff was engaged, or one in which Plaintiff could have engaged, based on those factors mentioned by the Court."

Mr. Goldman:

How about the part in the middle, the part which comes from your Florida case?

The Court:

Let's take this Florida case, then. "In order that the Plaintiff should be totally disabled and wholly prevented from performing any work—"

Mr. Carey:

That's a negative approach. That's the Court's argument in explaining why it comes to that conclusion.

The Court:

Listen to this. "Under the terms of the Contract upon which the Plaintiff sues, the Plaintiff is entitled to the disability benefits prescribed by that Contract if he is both totally and permanently disabled. Even if he is disabled, he is not entitled to recover unless such disability is total and also permanent." I think we have summed it up in this other instruction.

Mr. Goldman:

The word "permanent" wouldn't apply here. We are not dealing with the question of permanent injury.

Mr. Sams:

The only thing I would like in here is some statement that this does not mean that the Plaintiff cannot do anything. "From business time." It says what business time means. It does not mean the Plaintiff is disabled or he cannot carry on any type of work.

Mr. Carey:

I contend that's argument.

The Court:

Let's go back. I think we are pretty much agreed. We will take up No. 2.

Mr. Goldman:

Are you refusing it?

The Court:

We will pass No. 1. I don't think it is necessary. "I charge you that 'business time' in a policy insuring against loss of business time caused by accident or injury or sickness refers to time lost from the occupation in which the insured was engaged at the time the disability was sustained, or the time lost from some other occupation in which the insured might have been able to have been engaged within the range of his normal ability, taking into consideration his education, training and work, and his physical and mental condition." Followed by this. "If the insured becomes physically or mentally incapacitated to such an extent as to be wholly unable to engage,

so as to suffer total loss of business time. The language of the Policy involved in this case reads that payment shall be made if the insured suffers a total loss of business time."

Mr. Carey:
Of all of his business time?

The Court:
Yes. "The language of the policy dealing with disability does not in legal contemplation mean a state of helplessness or of inability to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit; but the incapacity contemplated means incapacity or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged, or in which he might have engaged within the contemplation of the particular Insurance Policy."

Mr. Sams:
The word, "permanently" was in there, and I don't think it should be.

The Court:
"Wholly unable."

Mr. Sams:
That's right.

Mr. Goldman:
I don't understand that last clause.

The Court:

"The language in the Insurance Policy involved in this case provides that the insured shall "receive a monthly stipend if he has suffered a total loss of all of his business time. Such language, however, does not in legal contemplation mean etc."

Mr. Carey:

What we should say is, "If he is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time." Those are the words of the Policy.

Mr. Goldman:

These interrogatories. Only the first three are involved.

The Court:

I wonder if you might look at the interrogatories. We are both pretty sure there has been some mistake. I have thrown that second page out.

Mr. Carey:

I wonder if I might make a suggestion. The interrogatories assume a verdict for the Plaintiff. It would seem to me that Your Honor should state or put in that form, "If you find a verdict for the defendant, you will not answer the following interrogatories." And then continue on.

The Court:

I will tell them that in my instructions.

Mr. Carey:

One says, "If you find for the Plaintiff the," and so forth.

The Court:

I will say that I am handing them interrogatories in the event they do find for the Plaintiff they may answer.

Mr. Carey:

If they find for the defendant they will ignore the interrogatories.

The Court:

Yes, they know all about that. Let's go back to your instructions.

Mr. Carey:

I have one additional one, Judge.

The Court:

No. 1. I will give the Red book on that. It is the same thing. I will give the one about the scales, and that sort of thing.

Mr. Goldman:

No. 2. That is covered by the thing we worked out, Your Honor.

The Court:

I think that's correct, don't you?

Mr. Carey:

Not entirely, Your Honor. This does contain a portion of the Policy which I think they should have in the charge, and I believe the rest of the charge is applicable. However, we have stated that there is no issue as to partial loss, and possibly that paragraph and sub-paragraph should come out.

The Court:

Yes. Starting with the second paragraph, cut out everything down to the second quote. Cut out everything except the four lines down to "defined." That was covered by the other instructions.

Mr. Goldman:

O.K.

The Court:

I don't think the last paragraph is necessary.

Mr. Carey:

All right.

The Court:

The next one.

Mr. Goldman:

That's going over it all again. No. 3 has already been covered.

Mr. Carey:

The second paragraph should come out with respect to partial loss.

The Court:

No. 3 is out. No. 4.

Mr. Goldman:

That's a legal proposition. It does not have any business in there.

The Court:

I am afraid it may be misleading because he hasn't paid his premiums.

Mr. Carey:

We have stipulated that there is no question about premiums.

The Court:

He hasn't paid his premiums for several years.

Mr. Goldman:

He may have, but I am not sure. I don't know as to that.

The Court:

I think it is more argument than anything else. We are only concerned with this period. I will give this instruction. "Gentlemen of the jury, you are only to consider the period involved as respects to this Policy. You are not to consider any other period."

Mr. Sams:

That's all right. There is no claim for any future disability. We are claiming only the payments past due under the Policy.

Mr. Carey:

If that is Your Honor's ruling, it might be misleading.

The Court:

Let's forget about it. We will not comment upon past and future. Do you have any objection to No. 5?

Mr. Goldman:

I have no objection down to the middle. "But may consider such evidence as it may or may not bear upon the claim for alleged total disability in the past." I want that in there, but the language seems awkward.

The Court:

Maybe you can improve on it. You can say that is the period subsequent to September 10, 1952.

Mr. Carey:

I have no objection to that. Instead of saying, "in the past," say, "subsequent to September 10, 1952." No. That's confusing too. That would bring it up to current date. I think it is all right as it is, if the Court please. The point is that the Plaintiff has himself taken out of the jury's consideration, any allegation of disability—

Mr. Goldman:

All right. Leave it as it is.

Mr. Carey:

What citations were you reading from, Judge?

The Court:

New York Life Ins. Co. vs. Bird. 12 So. 2nd, 457. 12 Sou. 2. 454. 165 Sou. 2. 50. 160 Sou 2 883 173 Sou 2 696.

(Thereupon a short recess was had, after which the following proceedings took place.)

The Court:

Have you gentlemen gone through these since they have been typed out?

Mr. Carey:

Yes, sir.

The Court:

Do you find anything foreign there than we discussed?

Mr. Carey:

There is one charge. "The language of the Policy dealing with disability does not in legal contemplation mean a state of helplessness. I object to that because I think it is a negative and argumentative approach to the problem, and that your other charge has fully instructed the jury with respect to the meaning of total loss of business time and disability within the Policy terms.

The Court:

In the Bird case they use the same language. They have asked for this instruction.

Mr. Carey:

It is cumulative and repetitious, and is argumentative, I respectfully submit.

The Court:

I think I will give it because it is within the contemplation of the decisions.

Call the jury in.

(Thereupon the jury returned to the Courtroom, and counsel waiving polling of the jury, the following proceedings were had):

Mr. Carey:

I think I should say at this time in view of counsel's statement that he makes no contention of disability at the present time because of a heart condi-

tion, we feel it would be a waste of the Court's time to bring in the further medical witness with respect to his condition at the present time, who was a heart specialist.

The Court:
Counsel has so agreed, as I understand?

Mr. Sams:
Yes, sir.

Mr. Carey:
With that in mind, if the Court please, the defendant rests.

The Court:
All right. Does the plaintiff have any further or other testimony?

Mr. Sams:
No, sir.

The Court:
That being the case, the plaintiff will proceed and address the jury.

(Thereupon counsel argued before the jury.)

Charge of the Court.

Ladies and gentlemen of the jury, I have already told you what this case was about, what the issues were, and counsel have described it to you I think very clearly. I will not endeavour to outline the issues any further than to say that essentially it is a

suit by Dr. Stokes who held an Insurance Policy that required the Company under certain conditions, if they ever existed, after the Policy was issued, while premiums were paid, to pay him a monthly stipend in the event he became disabled through accident or sickness from essentially performing his usual business, or engaging in business as I will afterwards define to you.

The denial of the Company, of course, is that he was not totally disabled, or if he was, he has not remained totally disabled, and that question is put up squarely to you.

Now the function of a jury in the trial of a law suit is to try and determine the issues of fact. The issues of fact are those material allegations alleged on one side and denied on the other side. You are the sole judges of the truth of the facts in issue. As respects to the law, the Court gives you the law, and that is solely within the province of the Court.

You are the sole judges of the weight of the testimony and the credibility of the witnesses. If you find the testimony to be conflicting you should try and reconcile the conflict, if any, without imputing perjury to any witness; but in the event you fail to reconcile the conflicts in the testimony, then it is within your province to reject such testimony as you find to be untrue, and to accept and rely upon such testimony as you find to be worthy of belief.

The burden of proof in regard to proving the issues of fact is upon the plaintiff. The plaintiff in regard to the issues of fact in order to be entitled to a verdict from you must prove by a preponderance of evidence those material allegations which are denied.

To illustrate what is meant by a preponderance of evidence it may be assumed that we have a set of scales, like the scales of justice often depicted by

painters and illustrators, which are those scales consisting of two saucer-like receptacles suspended from opposite ends of a bar, which are equally and evenly balanced by a fulcrum in the center, and so constructed that they are used by placing a weight on one end of the scales, and the object to be weighed on the other end, which, if of equal weight, would cause the scales to be balanced. If you will assume you have such a pair of scales and that the evidence is susceptible of being accurately weighed, and you consider the evidence worthy of belief in supporting the issues on behalf of the plaintiff on one side of the scales, and you then consider the evidence worthy of belief and supporting the issues on behalf of the opposing side on the opposite end of the scales, then the evidence of greater weight balanced against the evidence of a lesser weight will cause the scales to become unbalanced, and it may properly be said that the preponderance of evidence is on that side which shows the greater weight.

If the scales should be evenly and equally balanced after placing the evidence as suggested, then there would be no preponderance of evidence.

By a preponderance of evidence is meant the greater weight of evidence, that is, that the evidence taken as a whole inclines more to one side than it does to the other. In weighing the evidence you may consider the appearance and conduct of the witness on the stand, his or her manner while testifying; the interest, if any, or lack of interest, which the witness has or may have in the result of the suit; the opportunity which the witnesses had of knowing the facts concerning which they testify; their candor or want of candor; their apparent intelligence or lack of it, and the reasonableness or unreasonableness of their testimony, and from these and all other facts

and circumstances in the evidence, reach your conclusion as to where the truth of the matter lies.

You are further instructed that the term, "preponderance of evidence" as here used does not necessarily mean the greater number of witnesses, for it frequently happens that there are more witnesses on one side than on the other, and in all such cases it is the weight of the evidence that counts, and should govern the findings of the jury.

I charge you that since the policy says, "loss of business time," that "business time" in a policy insuring against loss of business time caused by accidental injury or sickness, refers to time lost from the occupation in which the insured was engaged at the time the disability was sustained, or the time lost from some other occupation in which the insured might have been able to have been engaged within the range of his normal ability, taking into consideration his education, training and work, and his physical and mental condition.

Should you find from the preponderance of the evidence that the plaintiff, as a result of injury or sickness as described in the Complaint as amended, was totally disabled by bodily injury or sickness during the period commencing September 10, 1952, through and including January 26, 1956, from engaging in his occupation as a physician, or engaging in any occupation in which he was able, taking into consideration his education, training and work, and his physical and mental condition, then you will find for the plaintiff and assess his damages at the rate of $150.00 per month for such months, if any, that you find him to have been so disabled.

Disability from performing an occupation as used in these instructions, means substantial or practical inability to do those substantial and material acts

and duties characterizing and pertaining to the occupation, and necessary to the carrying on of the occupation, whether it be the occupation in which plaintiff was engaged, or one in which plaintiff could have engaged based upon those factors mentioned by the Court.

If the plaintiff who was insured was disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time, he can recover the monthly payments promised in the policy for the time he remained so disabled.

The language of the policy dealing with disability does not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit, but the disability contemplated means disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged, or in which he might have engaged within the contemplation of the particular insurance policy.

The jury is instructed that the policy issued by the Continental Assurance Company defined the condition under which the monthly indemnity is to be paid as follows:

"If the insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time."

The jury is instructed that in order for the plaintiff to recover for a total loss of business time, he must prove by a preponderance of the evidence that he has sustained such total loss of all of his business time, as defined in these charges.

The jury is instructed to disregard all evidence with respect to abnormal heart condition as it bears upon the plaintiff's present condition, or any claimed present total disability, but you may consider such evidence as it may or may not bear upon the claim for alleged total disability in the past, if, in fact, you find he did at any time during the period in question, have a heart ailment, sickness or condition.

Now I have given you a number of instructions, and I charge you that you are not to take any one of them, and determine upon it, but you must take all the instructions as a whole, and consider them in arriving at your verdict.

The fact, if it be a fact, that I have repeated instructions, in the sense that I have emphasize, or some descriptive matter, or talked about something more than once, does not mean that you should give that emphasis or consider that I have arrived at any conclusion on the matter, because sometimes it is necessary to describe a legal point, or a legal position, and use several instructions so to do so as to impress the jury as to what particular measurement must be applied. And emphasis must not be considered if there be any repetition in these instructions.

Now in the event, and only in the event that you may find for the plaintiff, I am going to submit to you what is known as interrogatories, three in number, for you to answer. The answers will follow in the blank spaces immediately under the interrogatories, in the event you do find for the plaintiff. If you find for the defendant it will not be necessary for you to answer the interrogatories. If you do answer them you will fill out your answers, through your foreman, and the foreman will sign them, and return them with your other verdict.

Forms of verdict have been prepared for you, and the Clerk will hand those forms to one of your members. One of the forms pertains to a verdict for the defendant, and the other, a verdict for the plaintiff. Mr. Clerk, you may hand the forms to one of the members, along with the interrogatories.

Have there been any instructions, counsel, that you have noted that we passed over?

Mr. Carey:
I don't think so, Your Honor, from my standpoint.

The Court:
I think no.

Mr. Sams:
I think that covers it, Judge.

The Court:
All right. Will counsel please come forward.

(Thereupon counsel approached the bench out of hearing of the jury, after which the jury retired to consider their verdict.)

January 26, 1956.

(Counsel waiving polling of the jury, the following proceedings were had):

The Court:
Ladies and gentlemen of the jury, have you arrived at a verdict?

Foreman:
We have.

The Court:
Do you have the verdict?

Clerk:
Yes, Your Honor.

The Court:
Hand the verdict to the foreman. Mr. Foreman, will you open the verdict and inspect it, and if you find it to be the jury's verdict, hand it back to the Clerk.

Foreman:
This is it.

The Court:
Mr. Clerk, will you read the verdict.

Clerk:
"In the United States District Court in and for the Southern District of Florida. Miami Division. No. 5607-M-Civil. Edgar W. Stokes verus Continental Assurance Company. Miami, Florida, January 25, 1956. Verdict: We the jury find in favor of the Defendant. So say we all. Signed, Roy Fisher, Foreman."

The Court:
Do you desire the jury to be polled?

Mr. Carey:
No, sir.

Mr. Sams:
No, sir.

The Court:
Mr. Clerk, you will file the verdict, and the jury will be dismissed from further consideration of this case.

(Thereupon the case was concluded.)

United States of America,
Southern District of Florida. ss.

I, JULIAN A. BLAKE, Clerk of the United States District Court, in and for the Southern District of Florida, and as the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered from 1 to 301, inclusive, contain a true, full and complete copy of all such portions of the record, proceedings, and evidence in cause styled Edgar W. Stokes versus Continental Assurance Company, an Illinois corporation, number 5607-Miami, Civil, as appear upon the records and files of my office that have been designated by written directions of the parties to be included in this record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court at Miami, Florida, on this the 27th day of June, A. D. 1956.

JULIAN A. BLAKE,
As Clerk of the United States
District Court in and for the
Southern District of Florida.
By EARLE F. SPRIGG,
Chief Deputy Clerk.

(Seal)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 514

EDGAR W. STOKES,

Petitioner,

vs.

CONTINENTAL ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEAL P. RUTLEDGE
Counsel for Petitioner
835 duPont Building
Miami 32, Florida

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No.

EDGAR W. STOKES,

Petitioner,

vs.

CONTINENTAL ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on April 3, 1957.

CITATIONS TO OPINIONS BELOW

The United States District Court in and for the Southern District of Florida, Miami Division, rendered no opinion in this cause. Its Final Judgment appears in the

printed transcript of record, nine copies of which are submitted herewith, at pages 63-64. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix A hereto, infra, p. 1-9, is reported in 242 F. 2d 893.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on April 3, 1957 (R. 293; p. 10, infra.) A timely petition for rehearing was filed April 23, 1957 (R. 294), and rehearing was denied July 3, 1957 (R. 297). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether a United States Court of Appeals may review the question of the legal sufficiency of the evidence to support a jury verdict where that question is properly raised on appeal and has been passed upon by the District Court below on appellant's motion for new trial, but where no motion for a directed verdict was made in the District Court by appellant.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-

examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

This suit was originally brought in the Civil Court of Record of Dade County, Florida, by petitioner against the respondent to recover benefits claimed under a health and accident disability insurance contract (R. 4-11). The case was removed by respondent to the U. S. District Court whose jurisdiction was invoked because of diversity of citizenship, the petitioner being a citizen of Florida and the respondent a citizen of Illinois (R. 1-4). In the District Court, trial before a jury was held.

The evidence in favor of petitioner showed that petitioner is a 58-year-old physician (R.170); that he had purchased the policy sued upon in 1927 (R.11); that this policy provided for benefits should he become disabled by bodily injury or sickness "so as to suffer a total loss of all his business time" (R. 8-11); that since 1933 he has suffered from essential hematuria (R.171); that in 1946 he suffered a coronary heart condition (R. 171); that in 1951 he found it necessary to sell his sanitorium as the strain of operating it was too much (R. 171); that in 1952 he suffered head and other injuries in a serious automobile accident (R. 172-173; 122-124); and that again in 1954 petitioner suffered a myocardial infarction, or heart attack (R. 80-84).

Four physicians who had treated or examined petitioner testified that in their opinion petitioner was occupationally completely disabled. Dr. Keedy, who had examined petitioner approximately every six to eight

weeks over a period of three years (R. 220, 209), testified petitioner had, among other things, psycho-neurotic tendencies and some tendencies verging on being truly psychotic (R. 213), and that petitioner was occupationally "completely disabled" (R. 219). Dr. Dornberger, who had attended petitioner for about two years as family physician (R. 100), testified petitioner was totally disabled from a medical standpoint and unable to engage in gainful occupation (R. 98-99). Dr. Taylor, who had observed petitioner over a period of four years (R. 135), testified that petitioner is disabled and is disabled permanently to practice medicine (R. 134-135). And finally, Dr. LeDrew testified that he had examined petitioner only once at the request of the respondent insurance company and had reported that in his opinion Dr. Stokes was unable to work (R. 163-164). In addition, both petitioner and his wife also testified concerning his condition (R. 169-197; 197-207).

Respondent, in opposition, presented only the testimony of two doctors. One, Dr. Strain, after giving petitioner a neurological examination lasting a little longer than one hour (R. 240), stated that all of his examination neurologically was within normal limits (R. 240), but restricted his statement "solely to the field of his actual motor functions from a neurological standpoint". (R. 241). The other witness, Dr. Stewart, never saw or examined petitioner and merely testified that certain electrocardiograms of petitioner did not give definite information that cardiol damage had occurred (R. 255). He admitted it was impossible to say whether there actually was or was not cardiol damage from just the cardiograms he had seen (R. 255).

Petitioner did not move for a directed verdict, and the case was submitted to the jury who returned a verdict for respondent (R. 281). Petitioner filed a motion for new trial expressly challenging the legal sufficiency of the evidence to sustain the verdict in grounds 1, 2, 3, 8 and 9 (R. 64-65). The motion was denied (R. 66), and petitioner appealed expressly assigning as error the denial of his motion for new trial (R. 68).

The Court of Appeals expressly refused to consider the question raised, holding "the sufficiency of the evidence to sustain the jury's verdict is not before us." See 242 F. 2d 893, 894; infra, p. App. 3

REASONS FOR GRANTING THE WRIT

Federal law concerning appellate review of trial court rulings denying a motion for new trial is in a hopeless state of confusion. This confusion stems all the way from a concern on the part of some that the 7th Amendment forbids appellate review of such a ruling (See **Neese v. Southern Railway Company**, 350 U.S. 77) to the opinion of Judge Learned Hand, e.g., that only a "procedural difficulty" (which has since been removed) prevents such appellate review. **Miller v. Maryland Casualty Co.**, 2 Cir., 40 F. 2d 463. This Court, in an opinion by Justice Brandeis (with JJ. Stone and Cordozo dissenting), has indicated that appellate review of orders denying a motion for new trial depends upon whether the action of the trial court is based on error of "fact" or of "law". **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U.S. 474; see **Southern Pac Co. v. Guthrie**, 9 Cir., 186 F. 2d 926, 930:

"Since the decision in the Fairmount Glass

Works case, supra, it could not be said that there was any fixed rule that an appellate court might not review on appeal from the judgment, an order made upon motion for a new trial, where review is for an error of law."

Still other courts have adopted what Judge Hand calls the "impracticable rule" (40 F. 2d at p. 465) of granting appellate review only when an "abuse of discretion" is shown. **Davis v. Yellow Cab Co.**, 5 Cir., 220 F. 2d 790; **Daffinrud v. United States**, 7 Cir., 145 F. 2d 724. Judge Parker has expressed the rule that a trial court's order on motion for new trial "is not reviewable upon appeal, save in the most exceptional circumstances." **Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 122 F. 2d 350, 352.

Recently, this Court has indicated, more liberally, that a "dogmatic" denial of a new trial motion may be reviewed, **Griffin v. United States**, 336 U.S. 704; or that a denial of a new trial motion "when the findings of fact are wholly unsupported by evidence" is reviewable. **United States v. Johnson**, 327 U.S. 106, 111. See also **Metropolitan R.R. Co. v. Moore**, 121 U.S. 558, 574, where this Court ruled that the Supreme Court of the District should entertain and consider "on that ground" an appeal from an order denying a motion for new trial on the ground that the verdict was against the weight of the evidence.

Petitioner respectfully submits that the foregoing cases clearly show a need for this Court to review and to settle the precise scope of appellate review of orders denying motions for new trial. Some of the Nation's most outstanding federal circuit judges (e.g. JJ. L. Hand, Parker, Hutchinson, Pope) have wrestled with the con-

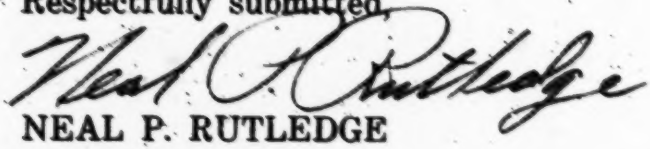
fusion which can only be removed and clarified by this Court.

Petitioner further submits that in this case, by his motion for new trial, he properly preserved and obtained the ruling of the trial court on the legal question of the insufficiency of the evidence to support the verdict. Clearly that question is a legal one. **Galloway v. United States**, 319 U.S. 372. Yet he has had no true appellate review of that legal question because the Court below ruled he "is foreclosed" by failure of his counsel to move for a directed verdict. If granted such review, it will show (1) a complete absence of any evidence in the Record that petitioner is not disabled, and (2) that petitioner has been unjustly denied the benefits of his policy with respondent, upon which he has paid premiums since 1927.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,



NEAL P. RUTLEDGE
Counsel for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit was mailed this 27th day of September, A.D. 1957 to: CAREY & PAPY, Attorneys for Respondent, Seybold Building, Miami 32, Florida.

Neal P. Rutledge

NEAL P. RUTLEDGE

APPENDIX A

The opinion and judgment below are as follows:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16238

EDGAR W. STOKES,

Appellant,

versus

CONTINENTAL ASSURANCE COMPANY

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 3, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment based on a jury verdict in the trial court in favor of the defendant insurance company in a disability case. The record is silent as to any motion for directed verdict for appellant and as to any objection to the charge of the court as to alleged errors here raised for the first time.

The plaintiff alleged that he was a physician who had been living in Louisville, Kentucky, where he had operated a sanitarium for alcoholics, drug addicts, nervous patients and mental patients for 27 years; that he sold the sanitarium in 1950 and gave up his operation of it in 1951; in February 1952 he was enroute to Florida, in which state he had learned that "there would be a position available in mental hygiene," and near Clewiston he had an automobile accident which he alleged caused him injuries that kept him in the hospital for five or six days after he had continued to Fort Lauderdale. There were no fractures and no permanent injuries except, as stated in his brief, over the next few months he "displayed symptoms of headache, nervousness, was exhausted, had a ringing in his ears." He testified that these symptoms "have persisted more or less to the present time" and that when he is under strain he cannot sleep and he is forgetful.

The testimony on behalf of plaintiff supported these allegations and medical witnesses gave the opinion that he was occupationally disabled. These opinions were in large part based on subjective symptoms and on the patient's history as related by him. All physical tests, including those of the brain and nervous system, were normal. On cross-examination the witnesses qualified somewhat their views as to the extent of disability, although it is quite clear that there was sufficient evidence on behalf of the plaintiff for the jury to have found in his favor. Medical witnesses for the defendant testified as to the normality of all tests made as to brain and nervous system as well as the heart. The plaintiff himself testified at length as

to his nervousness and irritability. He was therefore under constant observation by the jury both while on the witness stand and at the counsel table during the trial. In light of the fact that nearly all of the symptoms which plaintiff relied on to show his disability were subjective, that is, those related by him, and in view of his own participation in the trial and the fact that there was no proof of any effort by plaintiff to test his ability to engage in any business activity either within his medical field from which he had retired or as a mental hygienist, (**Mutual Life Ins Co. of New York v. Ellison** (5 Cir.), 223 F. 2d 686) we could hardly say, even if the point had been properly raised, that a jury verdict for the plaintiff was demanded.

Here, however, the sufficiency of the evidence to sustain the jury's verdict is not before us. Upon the conclusion of the entire case the defendant, and the defendant alone, moved for a directed verdict. The plaintiff was content to let the case go to the jury. We have repeatedly held that in such circumstances the question of sufficiency of the evidence to support a verdict for the defendant is foreclosed.

> "We find that no motion by any appellant was made in the trial for an instructed verdict, so that no question of the sufficiency of the evidence has been properly raised; ... ."
> **Baten v. Kirby Lumber Corp.**, (5 Cir.), 103 F. 2d 272, 273.

In **Boudreaux v. Mississippi Shipping Company, Inc.**, (5 Cir.), 222 F. 2d 954, we said:

"(1) Appellee, insisting that the jury's verdict is amply supported on the record, points out that there was no motion for a directed verdict, nor any objection to the giving or the failure to give an instruction. So pointing it urges upon us that the assigned error presents nothing for our consideration under the plain provisions of Rule 50(b) and Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and the authorities construing and applying them. We agree that this is so.

"(2) This court has never departed from but has consistently reaffirmed the rule governing in cases of this kind, as laid down in Baten v. Kirby Lumber Corp., 5 Cir., 103 F. 2d 272, 274:

'Whether the verdict is authorized by the evidence is a question not reserved in the trial. The defendants went to the jury without challenging its sufficiency, and no error can be attributed to the judge thereabout. Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict. Rule of Civil Procedure 50, 28 U.S.C.A., following section 723c does not do away with but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient.'"

The reason for this rule makes clear that it is no mere technicality. If a party believes that his opponent has failed to produce the sufficiency of evidence that will

support a verdict in his favor, he can choose either to ask the court to direct a verdict in his favor or he can take his chances with the jury. It is something of a gamble with him. If the court directs a verdict in his favor and this action is later reversed, he must face a new trial. He may therefore, in a doubtful case, prefer to leave his case up to the jury, as he did here. Having done so, and having lost before the jury, he cannot be heard later to say that the trial judge should be put in error for having submitted the matter to the jury in the first place. As has been so succinctly stated by Judge Sibley, under the circumstances of this case, "no error can be attributed to the [trial] court thereabout." **Baten v. Kirby Lumber Company, supra,** at 274.

The same bar exists to our considering the remaining contentions of appellant. The policy here in question does not have the usual language of disability policies such as "wholly . . . unable to engage in any occupation or profession or to perform any work for compensation, gain or profit," the language before the Florida court in **New England Mutual Life Ins. Co. v. Huckins,** 173 So. 696, or "impossible for the insured to follow a gainful occupation," the language considered by us in the Florida case of **Mutual Life Ins. Co. v. Ellison** (5 Cir.), 223 F. 2d 686. The language in the present policy is "If the insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time . . . "

In his printed brief and reply brief appellant does not directly and categorically urge that this language merits a different construction from that given to the more usual

language first quoted above. He implies that the language does place upon the insurance company the burden of showing that the insured is able to perform duties of some other business or activity once it is shown that he is unable to perform the usual and customary acts in connection with the practice of medicine, his occupation at the time the policy was issued.

First, as to the construction of the language itself. It may be that if the Florida courts were asked to decide that the language here used required only a showing that plaintiff was disabled from carrying on the duties of a physician to permit him to recover it might so hold. The plaintiff here, however, avoided making such a contention in the trial court and in his written briefs here. Only in oral argument did counsel take this unequivocal position. It may be that the reason he did not request a charge to that effect by the trial court (which he did not) is that it was plain from plaintiff's own testimony that before the injuries or sickness complained of he had already abandoned, or retired from, the practice of medicine, and had gone to a state where he could not continue to do so.[1]

Be that as it may the appellant did not request a jury charge embodying his concept of the proper construction of "loss of all of his business time." Moreover his counsel actively participated in the framing of the charge of the court that was given and of which he now complains.

---

[1] Appellant's brief states that he had learned that there would be a position available in "mental hygiene" in Fort Lauderdale; that "this appears to be a field of medicine which apparently does not require the participant to be examined under state laws."

This charge was:

> "The language of the policy dealing with disability does not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit, but the disability contemplated means disability or inability to the extent of being wholly or [sic] permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged, or in which he might have engaged within the contemplation of the particular insuranca policy."[2]

The trial court held extended discussion with counsel during the trial in the absence of the jury in an effort to iron out all difficulties as to the charge on this point. The court announced that it would charge the jury as follows, defining "business time":

> ". . . . I charge you that 'business time' in a policy insuring against loss of business time caused by accident or injury or sickness refers to time loss from the occupation in which the insured was engaged at the time the disability was sustained, or the time lost from some other occupation in which the insured might have been able to have been engaged within the range of his

[2]The use of the word "or" between "wholly" and "permanently" is clearly inappropriate. We do not know whether it is a misprint or inadvertence, but neither party here complains of it.

> normal ability, taking into consideration his education, training and work, and his physical and mental condition. If the insured becomes physically or mentally incapacitated to such an extent as to be wholly unable to engage, so as to suffer total loss of business time. The language of the Policy involved in this case reads that payment shall be made if the insured suffers a total loss of business time."

No objection or exception was taken to this proposed charge by plaintiff's counsel and no complaint is made of it here. The court then went on to read the paragraph defining disability quoted above, to which one of appellant's counsel said "The word 'permanently' was in there, and I don't think it should be." No objection was made to the definition of disability.

Thereafter the court gave the charges just as he had read them to counsel and then asked "Have there been any instructions, counsel, that you have noted that we passed over?" Thereupon Mr. Sams, counsel for appellant, stated "I think that covers it Judge."

We cannot assume that trial counsel overlooked the possibility that appellant might have succeeded in obtaining a more restrictive charge from the court as to the meaning of "loss of all of his business time" than that it meant substantially the same as "wholly . . . unable to engage in any occupation, etc." We do, however, recognize that such a request if made might have rendered the plaintiff's verdict, if won, vulnerable to attack on appeal. Counsel was required, therefore, to

elect whether to put the case to the jury on the law as announced or to risk a reversal on appeal for an incorrect charge. Having made the election he is bound by it. Even though we assume that the Florida courts might construe the language in this policy as requiring only a showing that plaintiff was disabled from practicing medicine. the plaintiff, for reasons best known to himself, preferred not to insist on this definition. That is why this court adheres to the rule of the Boudreaux case, **supra**, and doubtless why the Supreme Court said in **Palmer v. Hoffman**, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

Counsel for appellant, in oral argument, urged that we here have an exception to the general rule, and that we should note obvious error to prevent manifest injustice. A simple answer to this contention is that our reading of the record convinces us that if the court misconstrued the Florida law it is not an obvious error for counsel never pointed it out in the extended discussion over the charge and counsel does not cite any Florida cases to support his position here. In fact he relies on the language of the Florida Supreme Court in **New England Mutual Life Ins. Co. v. Huckins, supra**, a case in which the normal type of disability clause was before the court. Moreover our reading of the record fails to convince us that an affirmance of the judgment of the trial court would result in manifest injustice.

The judgment is AFFIRMED.

JUDGMENT.

Extract from the Minutes of April 3, 1957.

EDGAR W. STOKES,

No. 16238, versus

CONTINENTAL ASSURANCE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Edgar W. Stokes, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

LIBRARY
SUPREME COURT, U.S.

OCT 30 1957

JOHN T. FEY, Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 514

EDGAR W. STOKES, *Petitioner*,

v.

CONTINENTAL ASSURANCE COMPANY, *Respondent*.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

This suit originated in the Civil Court of Record in and for Dade County Florida by the petitioner against the respondent to recover benefits under a health and accident disability policy (R-4-11). The case was removed to the United States District Court upon the question of diversity of citizenship. Upon jury trial in District Court a verdict was returned for the respondent. The petitioner originally based his

Complaint upon bodily injury resulting from an accident of February 26, 1952 (R-4, 5) but subsequently amended the Complaint to reflect in addition thereto mental disease or illness precipitated by or aggravated by said accident or precipitated by or aggravated by a heart condition occurring on or about May, 1954 (R-62). At the conclusion of testimony, counsel abandoned any alleged disability resulting from a heart condition (R-273, 274).

The petitioner indicated his difficulties originated from the accident in 1952 (R-172, 173), with complications resulting from an earlier coronary condition (R-171), plus a myocardial infarction or heart attack (R-80-84). Nonetheless, the petitioner abandoned any contention of disability originating from the alleged heart condition (R-273, 274).

Bearing on the medical aspects of the case, both Dr. Keedy, the plaintiff's physician, and Dr. Strain, the Court-appointed physician, testified that they subjected the plaintiff to extensive clinical and diagnostic tests and that the results of the tests were negative or essentially negative (R-212, 216, 223, 240). Dr. Patterson and Dr. Taylor attended the plaintiff while he was in the Broward General Hospital in Ft. Lauderdale, Florida, for approximately five or six days subsequent to the accident. Dr. Taylor testified that the hospital record reflected no suggestion of concussion, nor did his diagnosis form indicate same (R-139, 140). Dr. Dornberger (R-77-121) suspected a mild heart attack in May, 1954, but admitted that his associate, Dr. Roberts, disagreed with this diagnosis and suspected the plaintiff had acute rheumatism (R-84, 85). Numerous electrocardiogram tests by Dr. Dornberger reflected only one tracing, the original one in May, 1954,

as abnormal, all others being normal (R-101). He indicated the plaintiff had made an uneventful recovery (R-102), admitting that the heart attack was in the least order of severity and the diagnosis doubtful (R-103). Dr. Keedy's testimony (R-207-231) indicated disability of a mental nature (R-219); however, the doctor admitted his examination of the plaintiff was purely for examination purposes and not for treatment (R-224). He cited psycho-neurotic tendencies, plus some verging on psychotic (R-214) which are matters not within his field (R-225), yet he had not sent the plaintiff to a psychiatrist for treatment (R-225). Dr. Keedy admitted that the electro encephalogram was normal and that he advised an insurance company in June 1953 that the patient was not then totally disabled (R-222). Dr. Strain (R-235-243), a neuro surgery specialist, examined the plaintiff as Court-appointed physician (R-236) and stated "all his neurological examination was within normal limits." (R-240).

Petitioner did not move for a directed verdict and the case was submitted to the jury who returned a verdict for the respondent. The petitioner filed a motion for a new trial, alleging the verdict to be contrary to the law and the evidence (R-64, 65), which motion was denied (R-66), and appeal followed thereafter which assigned as error the denial of the motion for new trial (R-68). The Court of Appeals sustained the District Court verdict, indicating that the question of "the sufficiency of the evidence to sustain the jury's verdict is not before us." (242 F.2d 893, 894). The Brief of the Appellant alleged that the verdict was contrary to the weight of the evidence, but in no instance did it allege nor attempt to prove that the trial

Court's denial of a motion for a new trial was a clear abuse of its discretion.

REASONS FOR DENYING THE WRIT

The petitioner cites in support and as the basis of his requested writ the necessity of a determination by this Court of the right of the Appellate Court to review the denial of a motion for a new trial. This proposition was neither briefed nor argued in the Appellate Court; the various Briefs filed in the Fifth Circuit Court of Appeals by the petitioner, appellant below, who had not requested a directed verdict, raised the proposition that the verdict was contrary to the weight of the evidence. On this point, there is complete unanimity of opinion that the plaintiff's or defendant's failure to move for a directed verdict precludes his challenging on appeal the sufficiency of the evidence. *Aetna Casualty & Surety* v. *Yeatts*, CCA 4, 122 F.2d 350, Aug. 22, 1941; *Boudreaux* v. *Mississippi Shipping Company, Inc.*, CCA 5, 222 F. 2d 954, June 2, 1955; *Cone* v. *West Virginia Pulp & Paper Co.*, 67 S. Ct. 752, 330 U.S. 212, 91 L. Ed. 849. This was the decision rendered by the Fifth Circuit Court of Appeals in this cause.

The petitioner attempts to bridge this gap, i.e., the failure to move for a directed verdict, by alleging that through his motion for a new trial he preserved the question of the sufficiency or insufficiency of the evidence to support the verdict. Again, the various Court decisions reject this contention and clearly recognize and define the distinction between the attributes of a motion for directed verdict and a motion for a new trial. *Marsh* v. *Illinois Central R.R. Co.*, C.C.A. 5, 175

F. 2d 498, July 8, 1949; *Aetna Casualty & Surety* v. *Yeatts*, C.C.A. 4, 122 F. 2d 350, Aug. 22, 1941.

Lastly, as earlier indicated, the petitioner contends for the very first time that the denial of the motion for a new trial is subject to review and that since no determination of this question was made by the Fifth Circuit Court of Appeals, certiorari should be granted with ultimate reconsideration by the Appellate Court of this question.

The question was never presented to the Appellate Court and should not now be initially raised on certiorari. *Springer* v. *U. S.*, 102 U.S. 586; *First National Bank* v. *Commonwealth of Kentucky*, 76 U.S. 353.

The alleged confusion cited by the petitioner on the point of the right to review a denial of a motion for a new trial is more illusory than real. The opinion of this Court in the case of *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, is pertinent as follows:

> "The rule that this Court will not review the action of a Federal Trial Court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions (citing cases), and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes, likewise, a review of such action by a Circuit Court of Appeals."
>
> * * * * *
>
> "It is urged that the refusal to set aside the verdict was an abuse of the trial Court's discretion and hence, reviewable. *The Court of Appeals has not declared that the trial Judge abused his discretion. Clearly, the mere refusal to grant a new trial* where nominal damages were awarded

is not an abuse of discretion." (Emphasis supplied.)

This Court further stated in *U. S.* v. *Johnson*, 327 U.S. 106, 111, 90 L. Ed. 562, 565, U.S. S. Ct., Feb. 4, 1946:

> "It is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial Court made erroneous findings of fact. *Holmgren* v. *U. S.*, 217 U.S. 509, 54 L. Ed. 861; *Holt* v. *U. S.*, 218 U.S. 245, 54 L. Ed. 1021; *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481, 77 L. Ed. 439, 44. While the Appellate Court might intervene when the findings of fact are wholly unsupported by evidence, *U. S.* v. *Secony Vacuum*, 310 U.S. 150, 247, 84 L. Ed. 1129, 1180; *Glasser* v. *U. S.*, 315 U.S. 60, 87, 86 L. Ed. 680, 708, *it should never do so where it does not clearly appear that the findings are not supported by any evidence.*" (Emphasis supplied.)

The *Fairmont* opinion, supra, has been utilized thereafter (the proposition set forth therein was well established prior thereto) to the effect that review of a denial of a motion for new trial may be proper under exceptional circumstances where a *clear abuse* of the trial Court's discretion can be demonstrated. It is patent in all the decisions, mostly relating to the factor of an abuse of discretion where the verdict was excessive and not presenting the question of insufficiency of the evidence, that the proof necessitates a showing of a "*clear abuse of the trial Court's discretion.*" *U. S.* v. *Regents of New Mexico School of Mines*, C.C.A. 10, 185 F. 2d 389, 392, Nov. 8, 1950; *Davis* v. *Yellow Cab Co.*, C.C.A. 5, 220 F. 2d 790, 791, Mar. 30, 1955; *South-*

ern Pacific Co. v. *Guthrie*, C.C.A. 9, 186 F. 2d 926, Jan. 15, 1951, Writ of Certiorari denied Apr. 9, 1951. In 3 Barron & Holtzoff, *Federal Practices and Procedures*, § 1302, p. 224 (Rules Ed. 1950) the author states:

> "A motion for new trial invokes the sound discretion of the Court. An order granting or denying a new trial is not reviewable except for clear abuse of discretion."

Professor Moore recites in 6 Moore on *Federal Practice*, 2d Ed., ¶ 59.08(5), at Page 3819:

> "What review, if any, may be had of the trial Court's grant or denial of a motion for a new trial on the ground that the verdict is against the weight of the evidence? None, *as a general proposition*, and this is in keeping with the usual principles that new trial rulings are, subject to certain narrow exceptions, non-reviewable. The motion for a new trial on the ground that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court, * * * but assuming that the Court has the power to consider the motion and does exercise such discretion, its error in granting or denying the motion, if any, is usually one of fact and non-reviewable. Under unusual or special circumstances, the trial Court's action may *constitute an abuse of discretion* and be reviewable, but *rarely can this be shown.*" (Emphasis supplied.)

The above authorities were cited with approval by the Third Circuit Court of Appeals in the case of *Nuttall* v. *Reading Co.*, C.C.A. 3, 23 F.R.S. 59A. 53, Case 1, 235 F. 2d 546, 548, July 5, 1956, where the Court states:

> "The authority of a trial judge to grant a new trial is expressly recognized by Rule 59, Fed. R.

> Civ. P., 28 U.S.C.A., which in turn refers back to 'any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of the United States * * *.' 6 Moore, *Federal Practice*, ¶ 59.05(5), p. 3759 (2d ed. 1953), discussing Rule 59, says: 'As the motion for a new trial is addressed to the sound discretion of the trial Court, its grant or denial of the motion is not normally subject to reversal in an Appellate Court * * *.' See, to the same effect, 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1302 (Rules Ed. 1950)."

Following thereafter in the case of *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.*, C.C.A. 3, 239 F. 2d 815, 23 F.R.S. 59A. 55, Dec. 28, 1956, the Court noted:

> "* * * it has been repeatedly held that an order denying a motion for a new trial is not appealable. * * * Ordinarily the denial of a new trial either involves an exercise of discretion, which is unreviewable in the absence of a *clear abuse* of it, * * *" (Emphasis supplied.)

Illustrative of the Fifth Circuit Court of Appeals' awareness of the problem involving the function or office of a motion for a new trial, is *Marsh* v. *Illinois Central R.R. Co.*, C.C.A. 5, 175 F. 2d 498, July 8, 1949, wherein the Appellate Court concluded that the trial Court, under the applicable Federal Rules of Civil Procedure, is vested with the right, irrespective of error, to grant a new trial at his discretion if he does not believe the verdict to be correct. The Court noted, at Page 500, that the exercise of his discretion is not ordinarily reviewable on appeal, although a failure to exercise discretion or *an abuse of it may be corrected*. This opinion on the exact point here involved neces-

sarily compels the conclusion that the petitioner's contentions were considered and rejected even though properly presented by his assignments of error or the Brief in this cause. At no time, including this Petition for Writ of Certiorari, has the petitioner presented the contention that the trial Judge clearly abused his discretion in denying the motion for a new trial, and as indicated by the factual material contained in the record herein, no such contention could in good faith be made nor sustained. Since no clear abuse of discretion was alleged nor demonstrated, certiorari should be denied.

As may be seen from Exhibits A, B, and C, (1) No directed verdict was requested, and therefore the sufficiency of the evidence cannot be tested on appeal; (2) a motion for a new trial is distinguishable from a motion for a directed verdict and the refusal to grant a motion for a new trial is reviewable only if a trial Court clearly abused its discretion in granting or denying same; and (3) since the contention that the trial Court clearly abused its discretion has never been presented and was not presented to the Appellate Court, Certiorari should be denied.

Further, these exhibits also indicate that the denial of petitioner's motion for a new trial on the basis that the verdict of the jury was contrary to the weight of the evidence was assigned as error by the Petition. This is also the identical proposition presented in the Petition for Rehearing, i.e., the matter of the insufficiency of the weight of the evidence. This also appears from the Transcript of Record of the United States Court of Appeals, Fifth Circuit, No. 16,232.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari, in that:

1. The Appellate Court properly adjudicated the question of the sufficiency of the evidence.
2. The petitioner has never properly presented the question of the alleged abuse of the Court's discretion in denying a new trial.
3. In view of the decided cases of this Court, U.S. District Courts, and U.S. Circuit Courts of Appeal hereinbefore cited and quoted from, it would seem clear that petitioner has not brought himself within the purview of Rule 19 of this Court respecting "Considerations Governing Review on Certiorari."

Respectfully submitted,

EDWIN A. SWINGLE
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Attorneys for Respondent

APPENDIX

APPENDIX A

Brief of Appellant As Follows:

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 16,238

EDGAR W. STOKES, *Appellant*

v.

CONTINENTAL ASSURANCE COMPANY, and Illinois Corporation, *Appellee*

BRIEF OF APPELLANT

STATEMENT OF CASE

Edgar W. Stokes sued Continental Assurance Company to recover benefits under a health and accident policy in the Circuit Court of Dade County, Florida. The complaint, as amended, alleged that the assured had become permanently and totally disabled within the meaning of the policy and demanded judgment for accumulated benefits, together with attorney's fees.

The suit was removed to the District Court and the defendant answered generally, denying the allegations as to the injury and breach. The answer contained a counterclaim seeking a declaratory decree and injunction (etc.) to which the assured replied. On a trial to a jury a verdict was found for the defendant, motion for new trial was seasonably made and denied, and this appeal taken.

Questions.

I.

Whether or not the Court erred in denying plaintiff's motion for a new trial on the grounds that the verdict of the jury was contrary to the weight of the evidence when such evidence without serious substantial contradiction established that the plaintiff was completely disabled, either by reason of bodily injury or sickness so as to suffer the loss of all of his business time within the meaning of the contract.

II.

Where an assured who is a doctor became disabled by reason of illness or injury from practicing his profession and sued the insurer for the benefits under the contract of insurance was the burden of proving that he was unable to perform the duties of some other occupation or to perform some other type of work on the plaintiff or the defendant?

The lower Court held that such burden was on the plaintiff.

III.

Was it error for the Court to charge the jury that in the suit above referred to the disability contemplated meant disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged *or in which he might have engaged* within the contemplation of the particular insurance policy.

Specifications of Errors.

The second and third specifications of errors are as follows (R. 8):

2. The District Court erred in making the final judgment dated January 26, 1956.

3. The District Court erred in making and entering its order dated March 9, 1956, denying appellant's motion for a new trial.

Brief of Argument

Question I.

Whether or not the Court erred in denying plaintiff's motion for a new trial on the grounds that the verdict of the jury was contrary to the weight of the evidence when such evidence without serious substantial contradiction established that the plaintiff was completely disabled, either by reason of bodily injury or sickness so as to suffer the loss of all of his business time within the meaning of the contract.

The plaintiff's case was supported by the testimony of himself (169), his wife (197) and the following physicians:

Dr. Dornberger (77)
Dr. Taylor (121)
Dr. Keedy (207)

There was also called as a witness for the plaintiff, Dr. Frederick LeDrew (162), who is an examining physician for the defendant and whose hostility was displayed to the Court on a request that the witness be called as a hostile one (154).

For the defendant there were two doctors: Strain (235) and Stewart (244). Dr. Strain had seen the plaintiff on one occasion, the examination lasting a little longer than an hour (240), and Dr. Stewart had never examined the plaintiff. Dr. Strain was a court-appointed physician who examined the plaintiff on January 15, 1956, which was some eleven days prior to trial.

Dr. Stokes.

Dr. Stokes was the the assured under a contract with Continental Assurance Co., in which it was agreed to pay him $150.00 a month for what was described as loss of business time as follows:

> "If the Insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time without indemnity, therefor becoming due under the provisions of either of paragraphs A, B or C of this Part, and if further such total loss of all business time continues as such without change for more than—3 months—(hereinafter called the excepted period) the company will pay indemnity for the loss of business time occurring thereafter."

according to certain formulas entitled "Total Loss of Time" specified in subparagraph 1, and "Partial Loss of Time" specified in subparagraph 2 (8, 14).

The Doctor had been operating a sanitarium in Louisville, Kentucky, for some twenty-seven years. In this sanitarium he treated alcoholics, drug addicts, nervous patients, mental patients and senile patients. In 1950, he sold his sanitarium but continued its operation under some arrangement with the purchaser until April of 1951. He had a coronary condition in 1946 and, learning that there would be a position available in mental hygiene in Fort Lauderdale, sold the hospital and came to Florida for the purpose of engaging in that occupation. This appears to be a field of medicine which apparently does not require the participant to be examined under state laws (170-172).

On February 26, 1952, while enroute to Florida, the plaintiff had an accident near Clewiston, Florida, a little town about 100 miles northwest of Miami. The weather was cold and rainy. As the doctor approached a bridge

on a curve, he was blinded by the lights of an approaching car, became panicky, put on the brakes and skidded off the road. His car went about 150 or 200 feet, turned over three times and when the plaintiff came to, he was lying in a canal full of water and thought that he was still in the bottom of the car. He got up and walked out to the bank. A police car took him to the Clewiston Inn where he administered some first-aid treatment to himself and spent the night (173).

The next morning before going to Fort Lauderdale, Stokes consulted a doctor in Clewiston, who withdrew the blood from a hematoma on plaintiff's abdomen (175).

About two or three days after he arrived in Fort Lauderdale, the plaintiff woke up with a severe pain in his left leg. He became alarmed, and at his request was admitted to the Broward General Hospital where he was placed under the treatment of Dr. Patterson. Plaintiff remained in the hospital for 5 or 6 days, during which time he was seen by Dr. Patterson and Dr. Taylor, who later testified in the trial. During this time he was suffering from an intense pain in his leg and shock. When he was released from the hospital, he returned to his home in Fort Lauderdale, and over the next few months displayed symptoms of headaches, nervousness, was exhausted, had a ringing in his ears, and when he turned over (176-179).

Some of these symptoms have persisted more or less to the present time, and those that now bother him are noises in his ears, the headaches and the nervousness. Whenever he is under strain, the plaintiff cannot sleep. He cannot remember things, but is getting to the point where he remembers past events better than he was able to a year ago. At that time he could not even remember past events. The day that the trial started, the plaintiff was so confused that after he left the court house his wife had to show him the way back, but on the morning when

he was giving his testimony, he was able to find his way back very clearly (179-184).

Mrs. Stokes.

Dr. and Mrs. Stokes had had some marital difficulties in approximately 1948. About two years before he sold the hospital, the Doctor became very nervous and upset. He could not get along with anyone, and he blamed his wife for everything that was wrong. His business was going down, and she kept begging him to sell it, for which he now blames her. After the hospital was sold, Mrs. Stokes and the Doctor were separated because it was impossible to live with him. He walked the floor practically every night and displayed extreme jealousy. About a year and a half after he had the accident, the parties became reconciled, but his condition has made it "a terrible thing to put up with." She suggested that the Doctor was unbalanced. He feels as though everyone is following him. The plaintiff and his wife live in a house on the corner of a block and cars turning the corner naturally throw their lights on the house, which the Doctor thinks the drivers are doing just to aggravate him. When they sit at the table to eat, he gets up to see the cars when they pass. The blowing of horns makes him think that the act is being done to aggravate him. Before he goes out at night he looks in the closets and under the beds and everywhere, and has many times come into his wife's room in the middle of the night and asked her to whom she was talking, although she had been sound asleep (198-201).

Prior to the accident the Doctor used to discuss his business with his wife, but since then he will not discuss anything with her. He will not tell his wife anything about his affairs. He carries on some correspondence, but simply lets his mail pile up until his desk at home is high with everything. Months and months later he might

look at the mail that should have been attended to earlier. He has his chair and desk piled with mail and things that should be attended to and puts things on the dining room table and will not allow his wife to touch them. He will not allow her in his bedroom except to make up his bed and "fix his floor, his chest and dresser, and everything is piled over everything in there." During the day he sits and reads a little and paces the floor most of the time (202).

Dr. Keedy.

Dr. Keedy is a qualified practitioner in neurology and neuro-surgery. He is a graduate of Amherst College, Cornell Medical College, and his background includes an internship in general surgery at Bellevue Hospital, New York City, a residency in neuro-surgery at Bellevue, a residency and general surgery at Memorial Hospital in Worcester, Massachusetts. He was sent by the Army to the Army Neuro-Surgical School at Columbia University, and was afterwards assigned to the Neuro-surgical Section in Texas, where he stayed about a year. He served a time in the overseas Neuro-surgical Evacuation Hospital in the European Theatre. On his discharge he was attached to the Brain Tumor Registry at Yale University, and since 1948 had practiced Neuro-surgery in the Miami area (208).

Dr. Keedy had seen Dr. Stokes on an average about every six to eight weeks over a period of three years, and the course of his examinations lasted anywhere from an hour to an hour and a half. The first examination commenced on January 30, 1953, and he was still seeing Dr. Stokes at the time of trial (209-210).

In testifying as to what his patient's initial examination consisted of, he stated that he received a history of Dr. Stokes in which the patient said that he had become excessively nervous, felt insecure and not as competent

as he formerly was in taking care of his affairs. Dr. Stokes was afraid to go into any business ventures for fear he would not make the proper decisions. He stated he has trouble spelling certain words which were well known to him, and which he formerly had no trouble with. He stated that at times he noticed he rambled in his conversation and could not remember what he said, so he was unable to finish his conversation. This was attributed to the Doctor having a poor memory. Stokes stated that he had some dizziness which had improved; that he frequently mislays things; continues to have mild headaches, and has heaviness around his heart. He stated that whenever he did anything that required any concentration, it usually produces a headache, and not infrequently, a heaviness around the heart. Stokes complained that he tired easily and became exhausted in attempts to do work. He had a constant itching and ringing and hissing sounds in his ears. (211).

A general physical examination produced results which were essentially negative. The patient was alert and cooperative, although somewhat garrulous and rambling in his history. He was well oriented; he was able to stand in a normal position without swaying. The visual fields were full to gross testing. The extra-ocular movements were well done. Eye vessels showed slight evidence of hardening of the arteries. Hearing was grossly normal. Stokes talks and swallows without difficulty. There was good strength and coordination in all four extremities. Tendon reflexes are active and equal. Blood pressure was normal; heart sounds, regular and of good quality (212).

At the time of his examination Dr. Keedy was of the opinion that the patient was suffering from a post concussion syndrome which was manifested by mild headaches, forgetfulness, difficulty in concentrating, and irritability (212). As Dr. Keedy continued to see the plain-

tiff he observed that over a period of time certain things came out. Primarily phycho-neurotic tendencies, and some tendencies verging on being truly psychotic (213).

The witness further stated that he thought Dr. Stokes was suffering from a disability; that the disability had extended over the period of his examination which had continued for the past three years, and he stated categorically that he thought that occupationally the plaintiff was completely disabled.

DR. DORNBERGER.

Dr. Dornberger is engaged in the practice of internal medicine in Fort Lauderdale, Florida. He was a graduate of the University of Nebraska Medical School in 1938. His internship was interrupted by four years in the United States Army and for the following seven years he was engaged in the practice of internal medicine at the Mayo Clinic, where he was later a consultant in internal medicine (78).

He first saw Dr. Stokes personally on the morning of April 24, 1954, at the witness' office where an electrocardiogram was taken, and the patient sent to the Broward General Hospital (80).

The doctor suspected from the electrocardiogram that his patient had an acute myocardial infarction. He had a low-grade fever, appeared somewhat pale, was extremely apprehensive and short of breath. His blood pressure was normal, but his blood preasure had been recorded at 146/82, which made the witness suspicious that the patient had had an acute heart attack (82).

The witness stated that the summary of the record of the patient in the hospital concluded with this statement:

> "It was the concensus of opinion of the internist who saw him that the clinical diagnosis was postero-

lateral myocardial infarction acute of mild degree. This is the final diagnosis and he will be continued to be treated in this manner. Dismissed." (87).

The witness categorically stated that in his opinion Dr. Stokes was disabled (97). He thought Stokes was totally disabled from a medical standpoint (98). He added that in January of 1955 in one report that he had made in writing in answer to a question as to whether he thought Dr. Stokes would be able to engage in any type of gainful occupation, that the witness had stated that in his opinion it was extremely doubtful whether Dr. Stokes would ever be able to engage in any gainful occupation (99).

The witness then significantly added that his opinion had not changed (since it was formed).

DR. LEDREW.

Before this witness was put on the stand, plaintiff's counsel made an effort to call the witness either as a hostile one, or to get the Court to call him as a Court witness. In both of these acts he failed. His position as to the hostility of the witness arose from the fact that on his deposition it had been brought out that the Doctor had been employed by someone representing the Continental Casualty Company, and stated that he should be loyal to the person employing him. Counsel further represented to the Court that Dr. LeDrew's attitude in his whole deposition was one of hostility all the way through. He said that the Doctor would not read records, from which counsel derived the opinion that the Doctor was hostile (154-155).

Dr. LeDrew was then called to the stand and asked limited questions concerning his background and his examination of the plaintiff. He said that he specialized in the field of physiciatry having graduated in 1919 with

a B.A. degree; obtained an M.A. degree in 1920 and an M.D. degree in 1926. He became a Diplomate of the American Board of Psychiatry and Neurology in 1934 and was a Lieutenant Colonel in charge of the neuro-psychiatric section at the First Air Force. He was employed by the Continental Casualty Company (a company affiliated with appellee) to make a medical examination of Dr. Stokes. The witness saw the plaintiff one time, and in answer to the question as to whether he reported to the insurance company what his opinion was concerning Dr. Stokes' disability, said:

> "I believe I said at that time that in my opinion he was unable to work, at the time I examined him." (162-164).

Dr. Taylor.

Dr. Taylor is engaged in the field of general surgery in Fort Lauderdale, Florida. He graduated in 1935, had approximately four and a half years of residency in Baltimore and North Carolina, spent five and a half years in the Army and had been engaged in the practice of medicine the rest of the time. He first saw Dr. Stokes on March 1, 1952, in Broward General Hospital. He was called in by a local physician to determine whether the plaintiff needed surgery after an accident. He got a general history from Dr. Stokes, and diagnosed his condition as shock, trouble in the legs, bad bruises, contusions and from the history of the patient being unconscious would say that he had a brain concussion (122-124).

The witness had seen the plaintiff several times each year and said that the plaintiff was still concerned about the veins in his leg and believes that one of them will break or give him trouble (134).

He was asked whether he presently had any opinion as to whether Dr. Stokes was suffering from any disabil-

ity and said, yes, that he would say that the plaintiff was disabled, and added that he thought the Doctor was disabled permanently from practicing medicine. The witness said that he had had the Doctor under observation for four years, had seen him lots of times in that period, and that in arriving at his conclusion he had taken into consideration a lot of subjective symptoms which were quite real to the plaintiff as well as the objective things that he had watched and observed from the beginning (134-136).

This concludes the testimony of the witnesses for the plaintiff. There was, of course, cross-examination in which the appellee obtained some qualifications of the witnesses' testimony on direct examination and secured from them certain admissions, but in the main the testimony of the plaintiff and his witnesses was to the effect that he was completely disabled within the meaning of the policy.

The witnesses for the defendant consisted of Dr. Strain and Dr. Stewart.

Dr. Strain.

Dr. Strain is a licensed doctor of medicine specializing in surgery of the nervous system. He graduated from Vanderbilt University Medical School in 1935, and had an internship and assistant residency in surgery at Stamford University Hospital. He spent two years in Lanchow China General Hospital in charge of surgery, taught surgery for three years at Bombay University and was on the surgical staff and taught at Vanderbilt University Medical School for four years on his return from Bombay. He had a fellowship and assistant residency in the Neuro-surgery at Boston City Hospital and had a year and a half Fellowship in Neuro-Surgery at the Lehigh Clinic. He is certified by the American Board of Neurological Surgery and a member of various Associations (236).

He testified as to the history which Dr. Stokes had given him. There is a great deal of history and physical observations combined in the Doctor's statement, but he said that Dr. Stokes' blood pressure was normal; that he was a nervous and voluble man; that he complained that his neck hurt him when he made an extreme motion, but in examining his cranial nerves there were found no abnormalities. The pupils were equal. His visual fields were full and there was no visual weakness. The cranial nerves all functioned normally; the importance of which conclusion lay in the fact that in case of a head injury, the visiting physician usually looks for some paralysis of cranial nerves. Sometimes in such cases one pupil is larger than another, but nothing was found in his examination to suggest any such injury. The witness concludes as follows:

"A. All his neurological examination was within normal limits.

Q. What were your conclusions, then, with respect to this patient from your examination as a specialist in your field neuro surgery?

A. This man now complained of headaches, being nervous following an injury, and his examination neurologically was within normal limits. I felt that the headaches that he complained of were produced by the trauma that he complained of that he had suffered, but there was no sign of any serious damage to his brain, nor to the nerves from that examination.

Q. Were there any findings in your entire examination, Doctor, other than his subjective complaints, that is, the subjective symptoms—things that he talked about or complained about?

A. No, sir. This examination was completely normal so far as the neurological examination was concerned." (237-240).

Dr. Franz H. Stewart.

Dr. Stewart never saw Dr. Stokes but was called as a witness to offset the testimony of plaintiff's witnesses to the effect that the electrocardiogram had shown some evidence of a heart condition. The witness said that on the basis of one electrocardiogram no definite opinion could be reached and from the ones that he had seen he could not find enough to enable him to form a reasonable conclusion that there was any evidence of heart disease. He added categorically that he would say there was no definite evidence of heart disease, but added that the electrocardiogram was not the whole story, and that he had not seen the patient (252).

Argument Regarding Testimony

The plaintiff was only required to prove his case by a preponderance of the evidence; and the Jury, although it was warranted, in selecting some evidence as being favorable for one side or the other and rejecting contradictory evidence, was not justified in applying prejudice or non-evidentiary standards as a part of the process of applying selective criteria. Where the burden is upon one party and the testimony is in equilibrium, the Jury is entitled, upon a dispute of facts, to reject testimony which lacks the patina of probability. But a Jury is no more entitled than a Court (of which it is an arm) to act arbitarily and whimsically. If the evidence preponderates in favor of one of the parties, the Jury is bound to find a verdict for such party.

In this case the plaintiff himself has testified to his disability; and it would not make any difference if all of the doctors in the world testified that he were all right. The Jury would be bound to accept the plaintiff's testimony unless it were convinced that he was committing perjury. There is no evidence that Dr. Stokes has committed perjury, and neither the Court, nor the jury were

warranted in inferring that such was the case. In fact, the Court instructed the Jury that it could not be justified in imputing perjury to anyone. If the Doctor is suffering from a mental condition which is so severe as to prevent him from practicing medicine, then he is disabled regardless of whether or not the medical men agree that his mental condition is real or whether he has any physical ailments. If he cannot work, he cannot work.

But there was a great deal more to the case than the testimony of Dr. Stokes. His wife's testimony is to our mind much more persuasive than the testimony of the physicians because she testified to certain radically eccentric actions of the Doctor which may not be disregarded. We think that the Jury would have been warranted in finding that Dr. Stokes was disabled upon the testimony of Mrs. Stokes alone. However, there is more to the case than that; and while the Court might be warranted in assuming that a wife will tend to support her husband's position in the testimony wherever she can do so, it is not warranted in assuming any more than that, and probably not that much in this case where it appears that the parties had been separated for some time, and the very conditions the Doctor complains of had tended to aggravate the reasons for the separation, or at least its continuance.

The parties had been separated before the Doctor had his accident and had become reconciled after the accident, but the Doctor's condition was difficult to put up with.

Of course, in addition to the testimony of plaintiff and his wife, there is the fact that he was involved in an automobile accident in which, very likely, he could have sustained substantial injuries. The appellee will no doubt try to discredit the testimony of Dr. Taylor that Dr. Stokes had had a brain concussion. An attempt will be made to minimize the extent of Dr. Stokes' injuries and to rule out any possible after effect, which it is assumed would

not follow except in the event of a visible injury to the head. But, of course, there are all kinds of concussions ranging from mild to extremely severe, and the accident that Dr. Stokes was in could certainly have produced almost any kind of traumatic injury, including a concussion of the brain.

All of the medical witnesses for the plaintiff, however, were not on his payroll and all of them were not friends. Dr. LeDrew was a physician employed by the appellee. The appellee might argue that Dr. LeDrew was not hostile. Plaintiff's attorney thought he was hostile and his opinion is entitled to a good deal of weight. If the plaintiff's counsel thought that Dr. LeDrew was a friendly witness, he certainly would have exploited the witness' opinion fully. Drs. Dornberger, Taylor and Keedy all concurred that the plaintiff was disabled. These are reputable medical men; there is no suggestion that they were biased, prejudiced or dishonest, and there is no reason to assume that their opinions were not based on valid medical facts. The fact that they disagreed with Dr. Strain does not mean a thing. Doctors normally disagree with each other, and the situation that exists "when doctors disagree" has become a standard example of limitations upon medical knowledge. The experiences of laymen are legion in which persons will go from one physician to another despairing of either diagnosis or cure, and then suddenly find one physician who will discover the secret of the patient's illness and effectively cure him with simple remedies.

In *Boyd* v. *Gosser*, 78 Fla. 64, 82 So. 758, the Court said:

> "So we have in this case upon the one side the law of mathematical probabilities, and upon the other the law of moral probabilities. 'Preponderance of the evidence' is a phrase which in its last analysis means probability of its truth. In a cause where there is conflicting moral evidence, the jury in the

one case, the chancellor in the other, is required to decide accordingly as the weight of the evidence preponderates in favor of one proposition or the other. That is to say, having no personal knowledge of the transaction under investigation, they must by the application of common knowledge and experience decide which set of witnesses or line of evidence raises the greater probability of its consistency with truth."

The testimony for the plaintiff "raises the greater probability of its consistency with truth." Why? Because normal people will tell the truth rather than lie, will work rather than idle, will prefer health to illness. The policy sued on was issued in 1927. Stokes had the accident in February, 1952. The defendant paid disability benefits for three months and then discontinued them. If plaintiff is attempting to commit a fraud on the company he certainly has waited a long time to put his thoughts into deeds. And he certainly has been able to persuade a lot of reputable people to aid and abet him. To us, it would seem that all of the witnesses were out of step, except Dr. Strain.

In *Equitable Life Assur. Soc. of U. S.* v. *Bomar et al.*, 106 F. 2d 640, suit was brought upon an insurance policy to recover disability benefits and the premiums alleged to have been unlawfully collected.

The Court said that there was substantial evidence tending to show that the deceased was physically weak and had suffered a change in mentality; that he would have spells when his memory would fail completely and that there was a loss of co-ordination in judgment; that he was unable to concentrate or grasp details; that he became irritable, not only with his family, but with his employees and customers and on various occasions would create scenes of violence; that he was restless and unable to sleep well. Dr. Simpson described him as a hopeless wreck, mentally and physically.

In the course of its opinion the Court said:

"(2) In his application for the policy issued in 1924, the insured gave his occupation and business as a 'hardware dealer.' He stated that he had no other occupation and contemplated no change. The disability clause must be construed in the light of these statements. *Prudential Ins. Co.* v *Harris*, 254 Ky. 23, 70 S.W. 2d 949, 953; *John Hancock Mut. Life Ins. Co.* v. *Cave*, 240 Ky. 56, 58, 40 S. W. 2d 1004, 79 A. L. R. 848. Appellant knew that it was insuring Bomar against total disability to transact a business requiring not only physical effort but judgment and discretion.

(3) If the insured was unable either physically or mentally to discharge the important and material duties necessary to the prosecution of his businesses in substantially his usual and customary manner, he was totally disabled. Such are the holdings generally and the Court of Appeals of Kentucky is in accord.

(4) In *Prudential Ins. Co.* v. *Harris*, *supra* (254 Ky. 23, 70 S. W. 2d 951), the court in construing a similar disability clause, said: 'We have construed the provision undertaking to limit the indemnity against disability to perform any kind of labor as contemplating an inability to do all the substantial and material acts necessary to the prosecution of the insured's business or that which is required of him in the performance of his occupation in the customary and usual manner.'

The court further said that—'For twenty years and more this rule of construction has been consistently applied * * *.' See also *John Hancock Mut. Life Ins. Co.* v. *Cave*, *supra*; *Equitable Life Ins. Co. of Iowa* v. *Hauser*, 269 Ky. 374, 107 S. W. 2d 282, 284.

Measured by this test, the evidence was sufficient to sustain the verdict."

In *Colorado Life Co. v. Steele*, 101 F. 2d 448, the plaintiff sued on a health and accident policy and recovered a judgment, which was affirmed on appeal. The Court reviewed the testimony of the plaintiff and decided that it was sufficient to support the verdict, saying:

> "In considering the question of the sufficiency of the evidence, it is our province to determine whether or not there was substantial evidence to sustain the verdict."

The Court then added that since the Jury had resolved the issue in favor of the plaintiff, it must accept the testimony in his favor as true and that he was entitled to draw reasonable favorable inferences therefrom.

In the case at Bar, the evidence does not preponderate in favor of the defendant, although the Jury found in its favor, the Court was not warranted in drawing favorable inferences from such fact. As we have shown, the testimony of the plaintiff and his witnesses was more than enough to establish a preponderance of evidence.

QUESTION II.

Where an assured who is a doctor became disabled by reason of illness or injury from practicing his profession and sued the insurer for the benefits under the contract of insurance was the burden of proving that he was unable to perform the duties of some other occupation or to perform some other type of work on the plaintiff or the defendant?

The lower Court held that such burden was on the plaintiff.

During the trial, the following proceedings took place regarding the instructions to be given the Jury (261):

> "Mr. Goldman: The very cases that Your Honor pointed out to me as a result of our conference

the other day, point out that the burden is on the Insurance Company to show what other occupation than the one the man is in, he could do; and there hasn't been one bit of evidence in here by the Insurance Company that Mr. Stokes could wash windows or teach school, or anything. There isn't any evidence.

The Court: He said he might have engaged in the real estate business.

Mr. Carey: The jury is entitled to draw from all of the evidence whether he could engage in other occupations.

The Court: You are correct, counsel. The burden is on them, when they come to argue the matter, as to whether or not it has been established one way or the other.

Mr. Carey: What we would like is a charge on the burden of proof.

The Court: It is on the plaintiff, and this Circuit has been very diligent about knocking out cases where I said the burden was somewhere else. What they mean by that in the decisions is that on appeal the burden is on them to show there was some miscarriage.

This action of the Court was error. The cases cited under the Third Question hold that ability to engage in some other occupation is irrelevant. In any case, if the insured were in fact able to do some other work, the burden was on the defendant to show this. It is not up to the plaintiff to prove that he could not do any other kind of work. The failure of the Court to charge the Jury on this point might well have caused the obvious miscarriage of justice implicit in the verdict. The omission is made more glaring by the error committed in giving the charge argued under the third question.

Question III.

Was it error for the Court to charge the jury that in the suit above referred to the disability contemplated meant disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged *or in which he might have engaged* within the contemplation of the particular insurance policy.

The Court charged the Jury (278) that:

> "The language of the policy dealing with disability does not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit, but the disability contemplated means disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged, or in which he might have engaged within the contemplation of the particular insurance policy." (See Motion for New Trial—65).

This charge was clearly erroneous and no doubt weighed heavily in the scales which the lower Court picturesquely described as illustrating a way to determine the weight of the evidence.

According to applicable authorities, the Doctor was entitled to recover if disabled to perform his professional duties.

In *New England Mutual Life Insurance Co.* v. *Huckins*, (Fla.) 173 So. 696, an action was brought by the assured to recover disability payments. The policy provided as follows:

"'If the insured * * * becomes physically or mentally incapacitated to such an extent as to be wholly and permanently unable to engage in any occupation or profession or to perform any work for compensation, gain or profit'; * * *"

The judgment was rendered in the Civil Court of Record upon a directed verdict. That judgment was affirmed by the Circuit Court, and the defendant brought certiorari. The plaintiff was a farmer who was injured by an accidental gunshot wound from a small calibre bullet which entered the right side of the right thigh, crossed the abdomen, and entered the left thigh injuring blood vessels. Doctors testified that there was definite damage to the femoral nerve; that he could perform some farming activities and render light manual assistance which did not require the use of his left leg. The testimony was that the plaintiff was not helpless, but he was incapacitated from doing the farm work that he formerly did. In quashing the writ, the Court said:

"As used in the insurance policy here sued on, the words, 'if the insured * * * becomes physically or mentally incapacitated to such an extent as to be wholly and permanently unable to engage in any occupation or profession or to perform any work for compensation, gain or profit,' do not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit; but the incapacity contemplated means incapacity or inability to the extent of being wholly and permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged or in which he may engage within the contemplation of the particular insurance policy, in sub-

stantially the customary or usual manner. Each case must be determined upon a just consideration of the pertinent facts and the provisions of the particular insurance policy, the latter being considered in the light of the intent of the parties under the intendments of the law that the insurance policy shall afford the protection when it can legally and fairly be done.

(9) The plaintiff is a farmer. This is shown by the application for the insurance policy. He had a high school education. Before his injury he did much of his farm work himself. He was healthy and active before the injury, and was forty-three years old at the trial.

* * *

* * *, and that because of the major permanent injury and consequent ailments and continuous pains, he is physically incapacitated to such an extent as to be wholly and permanently unable to engage in any occupation or profession, or to perform any work for compensation, gain or profit, within the meaning of the policy contract. See *Equitable Life Assurance Society of United States* v. *Wiggins*, 115 Fla. 136, 155 So. 327; *Equitable Life Assurance Society of United States* v. *McKeithan*, 119 Fla. 486, 160 So. 883. See also, *Hagman* v. *Equitable Life Assurance Society*, 214 Ky. 56, 282 S. W. 1112; *John Hancock Mut. L. Ins. Co.* v. *Cave*, 240 Ky. 56, 40 S.W. 2d 1004, 79 A. L. R. 848."

In *Mutual Life Ins. Co. of N. Y.* v. *Daigle*, 142 F. 2d 1000, the Court said:

"'The rule is stated in 14 R. C. L., § 491, p. 1315, as follows, viz.:

"The rule prevailing in most jurisdictions is that the total disability contemplated by an accident insurance policy does not mean, as its literal construction would require, a state of absolute help-

lessness which can result only from loss of reason, since as long as one is in full possession of his mental faculties he is capable of transacting some part of his business, whatever it may be, although he is incapable of physical action. On the contrary, these courts, giving consideration to the object of the contract, hold that the 'total disability' contemplated by the agreement is inability to do substantially all of the material acts necessary to the prosecution of the insured's business or occupation in substantially his customary and usual manner.'' ''

In *Mutual Life Ins. Co. of New York* v. *Binion*, (Ga.) 33 S. E. 2d 448, suit was brought by the appellee to recover disability payments under a life insurance policy providing for total and permanent disability benefits. A judgment was rendered in favor of the plaintiff, and on appeal it was affirmed. The opinion reveals that the insured was a physican who operated a medical clinic. The policy was issued in 1929, and in 1937 the doctor decided that he had to quit work entirely or reduce to part time. He decided on part time work. In 1941 he retired from the practice of medicine and surgery. He was suffering from high blood pressure, heart disease, Bright's disease, arthritis and impairment of vision. He filed a claim for disability and payments were made from February, 1941 to August, 1943 when payments were discontinued. The record revealed that he had not received any compensation from the practice of medicine, though he had hired others to operate his clinic and received a percentage of the profits. In affirming the judgment the Court said:

"There was other evidence, but there was no evidence showing that the insured did any work in connection with the operation of the clinic and hospital except to receive daily reports. Even this activity cannot reasonably be related to insured's putting forth any effort mentally or physically. It

would more appropriately be classified as a check on investments rather than activity operation of a business. Hiring others to operate a business is not personal operation of the business. The fact that the insured is able to go to his office or place of business for a short time each day does not render disability less than total if in fact he could do no work there. *Turner* v. *Fidelity & Casualty Company*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; *Thayer* v. *Standard Life & Accident Insurance Company*, 68 N. H. 577, 41 Atl. 182; *Baldwin* v. *Fraternal Accident Association*, 21 Misc. 124, 46 N. Y. S. 1016. If one is obliged to employ others to manage his business and can give personal attention to only a few details the disability must be regarded as total. *United States Casualty Company* v. *Hanson*, 20 Colo. App. 393, 79 Pac. 176 At the time of the issuance of the policy insured was a physican and surgeon. He subsequently continued such practice and also operated the clinic and hospital. The evidence shows conclusively that he had completely stopped the practice of medicine and surgery and stopped all activity in operating the clinic and hospital except to receive daily reports. Under the definitions of total disability laid down by the Supreme Court, the finding of total disability was demanded by the evidence. *Mutual Life Insurance Company* v. *Barron*, Ga., 30 S. E. 2d 879. Under the rulings in the Barron case the policy sued on is one insuring against loss of earning capacity and not against loss of income. The fact that insured's income was more than usual for the time in question is immaterial if his personal effort did not produce it. The finding that the insured was totally and permanently disabled during the time in question was demanded."

• • •

"The insurance company conceded that the insured became totally and permanently disabled on February 14, 1951, and paid disability benefits from then until September, 1943. In the absence of any explanation why it discontinued the benefit payments and of the information upon which it acted in so doing, the finding for damages and attorney's fees was not unauthorized as a matter of law."

In *John Hancock Mut. Life Ins. Co.* v. *Schroder*, (Ala.) 180 So. 327, an action was brought for disability benefit under a life insurance policy. From a judgment for the plaintiff the defendant appealed. It was admitted at the trial that he was not able to engage in a substantial occupation for which he was fitted, considering his education and experience. The plaintiff had suffered an airplane accident which resulted in permanent injuries to both feet. Payments were made from June, 1932 to August, 1936, when the company refused to make further payments. The plaintiff was able to walk with the aid of canes. The record indicated that he was a salesman or solicitor. He could also drive to his customers' places of business and walk in without assistance, but he could not stand upon his feet without considerable pain. The doctors testified that he would be better off if his feet had been amputated. In affirming the judgment, the Court said:

"Contracts of insurance are written by the insurer, and, whenever there is ambiguity or uncertainty in the contract, the court will resolve the uncertainty in favor of the insured; or, if the contract is susceptible to two constructions, the one most favorable to the insured will be adopted. However, where there can be but one meaning, the court has no choice but to give it that meaning. In such case there is no room for construction. *McGifford* v. *Protective Life Ins. Co., supra.*"

"We have uniformly held that the term 'totally and permanently disabled from engaging in any occupation' is not to be construed as requiring a state of complete helplessness, but means no more than the inability to perform the material acts of insured's business or occupation in substantially his customary and usual manner."

CONCLUSION

We do not see how it can be contended seriously, that Dr. Stokes is competent to practice medicine. This is the occupation that he was engaged in when the policy was issued. As the Court said in *Equitable Life Assurance Society* v. *Bomar, supra*, the disability clause must be construed in the light of the statements made at the time of the application for the policy, and with respect to the occupation in which the insured was then engaged. If Dr. Stokes was competent and able to perform some other gainful occupation, notwithstanding the impairment of his health and his faculties, it is clearly upon the insurance company to show this upon a preponderance of the evidence. It was not necessary for the Doctor to prove a negative fact, if fact it be.

The Jury was not warranted in rejecting the testimony of the plaintiff, his wife and the several physicans who testified for him, and therefore the verdict was contrary to the weight of the evidence. The Court erred in denying the motion for a new trial. The trial was infected with the misconstruction, which the Jury placed upon the weight of the evidence, the failure of the Court to charge the Jury with respect to the burden of proof and the affirmative error committed with respect to other occupations of the insured.

The judgment should be reversed.

Respectfully submitted,

THOMAS H. ANDERSON,

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APPENDIX B

Brief of Appellee as Follows:

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 16,238

EDGAR W. STOKES, *Appellant*

v.

CONTINENTAL ASSURANCE COMPANY, an Illinois Corporation, Appellee

BRIEF OF APPELLEE

A.

STATEMENT OF CASE

The Appellee accepts the Appellant's statement of the case.

B.

STATEMENTS OF POINTS TO BE DISCUSSED

POINT I.

A. In the absence of a motion for a directed verdict, the sufficiency of evidence to support a verdict and judgment may not be tested on appeal (Tr. 256-259). *Baten* v. *Kirby Lumber Corp.*, 1939 5 Cir., 103 F. 2d 272; *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 1955 5 Cir., 222 F. 2d 954; *Atlantic Coast Line R. Co.* v. *Smith*, 1952 5 Cir., 135 F. 2d 40; *F. W. Woolworth Co.* v. *Seckinger*, 1942 5 Cir., 125 F: 2d 97; *Atlantic Coast Line R. Co.* v. *Mims*, 1952 5 Cir., 199 F. 2d 582; *Whelan* v. *Welch*, 269 Fed. 689.

B. The verdict of the jury was amply supported by the evidence (See argument).

POINT II.

A. Appellant has waived his right to object to the jury charge assigned as error by his failure to make timely objection to it. (Tr. 267-268, 278, 280). Rule 51, Fed. Rules of Civil Procedure. *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 1955 5 Cir., 222 F. 2d 954; *Atlantic Coast Line R. Co.* v. *Mims*, 1952 5 Cir., 199 F. 2d 582; *Standard Oil Co.* v. *Burleson*, 5 Cir., 117 F. 2d 412; *Western Fire Ins. Co. of Fort Scott, Kansas*, v. *Word*, 5 Cir., 131 F. 2d 541; *Good Holding Co.* v. *Boswell*, 5 Cir., 173 F. 2d 395; *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719.

B. The jury was fairly and accurately charged as to the law in the case. *New England Mutual Life Insurance Co.* v. *Huckins*, (Fla.) 173 So. 696.

ARGUMENT

POINT I.

A. In the absence of a motion for a directed verdict, the sufficiency of evidence to support a verdict and judgment may not be tested on appeal (Tr. 256-259).

The record (Tr. 256-259) reflects that at the conclusion of the testimony, the appellant failed to make any motion for a directed verdict. An examination of the entire record fails to reveal any such motion.

In *Baten* v. *Kirby Lumber Corp.*, 103 F. 2d 272, 273, this Court said:

> "We find that no motion by any appellant was made in the trial for an instructed verdict, so that no question of the sufficiency of the evidence has been properly raised; * * *."

In *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 222 F. 2d 954, the following language is found:

"(1) Appellee, insisting that the jury's verdict is amply supported on the record, points out that there was no motion for a directed verdict, nor any objection to the giving or the failure to give an instruction. So pointing it urges upon us that the assigned error presents nothing for our consideration under the plain provisions of Rule 50(b) and Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A., and the authorities construing and applying them. We agree that this is so.

"(2) This court has never departed from but has consistently reaffirmed the rule governing in cases of this kind, as laid down in Batem v. Kirby Lumber Corp., 5 Cir., 103 F. 2d 272, 274:

'"Whether the verdict is authorized by the evidence is a question not reserved in the trial. The defendants went to the jury without challenging its sufficiency, and no error can be attributed to the judge thereabout. Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict. Rule of Civil Procedure 50, 28 U. S. C. A., following section 723c, does not do away with but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient.'"

The judgment is affirmed."

In *Atlantic Coast Line R. Co.* v. *Smith*, 135 F. 2d 40, 41, the following language is found:

"(1-3) The defendant railroad made no motion for directed verdict on the second trial, but it now seeks to question the sufficiency of plaintiffs' evidence by attacking the action of the trial court in overruling its motion for new trial. Although we think the evidence sufficient to support the verdicts and judgments, it should be pointed out that sufficiency of evidence to support a verdict and judgment may not be

tested on appeal in this way. The test of sufficiency of the evidence may be made on the trial and preserved for appeal purposes by timely motion for directed verdict. Furthermore, in Federal Courts the granting or refusing of a motion for new trial rests within the sound discretion of the trial court, and its ruling on such motion will not be disturbed on appeal in absence of a showing of manifest abuse of discretion. No such abuse of discretion is shown here. Teche Lines v. Boyette, 5 Cir., 111 F. 2d 579."

Authorities supporting our contention are outlined in detail in *Whelan* v. *Welch*, 269 Fed. 689:

"(1) 1. It is asserted that the court erred in overruling a motion for a new trial based on the assumption that the verdict was not sustained by sufficient evidence. According to federal practice this is not assignable as error. Mr. Justice Story, as long ago as Barr v. Gratz, 4 Wheat. 213, 220 (4 L. Ed. 553), said that it 'is too plain for argument that such a refusal affords no ground for a writ of error.' See, also, Crumpton v. United States, 138 U. S. 361, 363, 11 S. Ct. 355, 34 L. Ed. 958; Wheeler v. United States, 159 U. S. 523, 524, 16 S. Ct. 93, 40 L. Ed. 244; Moore v. United States, 150 U. S. 57, 61, 14 S. Ct. 26, 37 L. Ed. 996; Brown v. Clarke, 4 How. 4, 15, 11 L. Ed. 850; United States v. Daniel, 6 Wheat. 542, 545, 5 L. Ed. 326.

"(2) If appellants desired to raise the question of the sufficiency of the evidence, they should have done so by a request for a peremptory instruction to return a verdict in their favor (German Insurance Co. v. Frederick, 58 Fed 144, 148, 7 C. C. A. 122; Western Coal & Mining Co. v. Ingraham, 70 Fed. 219, 222, 17 C. C. A. 71; Joplin & P. Ry. Co. v. Payne, 194 Fed. 387, 389, 114 C. C. A. 305); but they did not do so. On the contrary, they requested the court to submit the case to the jury, thus impliedly stating that there

was a question for the jury's consideration. Williams v. Vreeland, 250 U. S. 295, 298, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. They will not now be heard to say that the representation was not correct. United States v. Memphis, 97 U. S. 284, 292, 24 L. Ed. 937; Hartford Life Ins. Co. v. Unsell, 144 U. S. 439, 451, 12 S. Ct. 671, 36 L. Ed. 496; Walton v. Chicago, St. Paul, etc., Railway Co., 56 Fed. 1006, 6 C. C. A. 223; Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co., 85 Fed. 417, 421, 29 C. C. A. 239.

"Appellants refer us to a number of decisions wherein it was ruled that if the testimony is of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition thereto, the case should not be submitted to the jury. Of course that is true. But how must the question be raised, so that it may be examined by a reviewing court? Not for the first time by a motion for a new trial, but always by a request for a directed verdict. And that is the manner in which it was presented in the cases cited. None of them countenances the procedure followed here."

In *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582, 583, the court said:

"(4, 5) When it comes, through, to the merits of the claims of error it makes, appellant finds itself greatly hampered by its failure in the course of the trial to timely call the attention of the Court to the contentions it now makes. This is notably so with reference to its claim that the evidence is insufficient to support the verdict. Despite the rule requiring it, as a predicate for the assignment of error, no request for an instruction to that effect, either on the case as a whole or any phase of it, was made.

"We do not, therefore, consider appellant's contentions as to the insufficiency of the evidence."

The same rule was followed in *F. W. Woolworth Co.* v. *Seckinger*, 125 F. 2d 97, where it was said:

> "(1) Several specifications of errors are made on appeal. Those urging the insufficiency of the evidence to sustain the verdict will not be considered. No motion was made for a directed verdict, as required by Rule 50 of the Rules of Civil Procedure, 28 U. S C. A. following Section 723c, in order to raise a reviewable legal question as to the sufficiency of the evidence."

In the absence of any motion for a directed verdict by the appellant, the question of the insufficiency of evidence to support the verdict cannot be raised on this Appeal.

B. The verdict of the jury was amply supported by the evidence.

At the outset of this case the plaintiff below based his claim for disability insurance benefits upon the allegations in his complaint that he received bodily injury on February 26, 1952, through accidental means; that he was seriously and permanently injured and thereby totally disabled from continuing his occupation, that of a physician (Tr. 4-5).

Thereafter, the plaintiff amended his complaint to allege in addition that from December 10, 1952, to the present he has suffered a total loss of business time as a result of mental disease or illness precipitated by, or aggravated by, the accident of February 26, 1952, and as a result of mental disease or illness precipitated by, or aggravated by, a heart condition occurring on or about May, 1954 (Tr. 62).

The answer (Tr. 7-10) denied that the disability of the plaintiff, if any, came within the defendant's undertaking and averred that the plaintiff retired from his profession prior to the mentioned accident and that the plain-

tiff was not gainfully employed or engaged in any type of business or profession at the time of the accident.

The answer also denied that the plaintiff was injured or disabled by the accident so as to render him incapable or unfit to carry on his former business or occupation. "Nor was the claimed disability severe enough to cause him to 'suffer a total loss of all business time' had he chosen to carry on his former business or occupation."

At the close of all the testimony in the earlier cause it was agreed by counsel that there was no contention by the plaintiff of disability at the present time because of a heart condition (Tr. 359-360) and the jury was instructed, without objection, to disregard evidence respecting any present abnormal heart condition. They were instructed that they might consider such evidence in connection with the claim for total disability in the past.

We submit that ample evidence to support the verdict is found in the testimony of the two neuro-surgeons who testified, one for the plaintiff and one for the defendant.

Both Dr. Keedy, who testified for the plaintiff and Dr. Strain, the court appointed physician (Tr. 338) who was called by the defense, testified that they subjected the plaintiff to extensive clinical and diagnosis tests and that the results of the tests were negative or essentially negative (Tr. 315, 319, 325, 342).

In other words, although the plaintiff, formerly the director of a phychiatric hospital (Tr. 274), gave a history of psychiatric disturbances, the results of clinical or objective tests indicated that he was perfectly normal.

As to the accident of February 26, 1952, the only evidence was that of plaintiff below (Tr. 274-300).

He gave an account of skidding off the road and coming-to in a canal. Police who arrived at the scene did not take the plaintiff to a hospital but to the Clewiston Inn

(Tr. 278) where he received no medical attention other than that which he administered himself. He treated himself with penicillin to purify his blood (Tr. 278).

The next morning the plaintiff visited a physician in Clewiston who was at the Clewiston Hospital at the time. This physician treated the plaintiff for a hematoma on his abdomen. The physician did not hospitalize the plaintiff (Tr. 280, 294, 299, 300).

Two or three days after the accident plaintiff went to the Broward General Hospital in Ft. Lauderdale. At that time he was not under the care of a physician and sought admittance on his own account (Tr. 280). He remained in the hospital five or six days (Tr. 282).

A Dr. Patterson attended the plaintiff while he was in the hospital (Tr. 282). The plaintiff said he went to the hospital because of intense pain in his left leg, and also shock (Tr. 282).

It may be significant that neither the Clewiston police, who saw the plaintiff soon after the accident and took him to a hotel rather than a hospital, the Clewiston physician who treated plaintiff the following morning, nor Dr. Patterson were called as witnesses for the plaintiff.

The plaintiff's condition following the accident is important because his account of the accident to the physicians who later examined him had considerable bearing upon their several diagnoses.

Dr. Taylor (Tr. 226-257), a general surgeon, visited the plaintiff while he was at the Broward General Hospital. He said Dr. Patterson was the attending physician (Tr. 243). He was called to determine if the plaintiff required surgery because of possible blood clots in his leg.

Dr. Taylor was asked on cross-examination, "You did not diagnose his condition as incorporating or having or including a concussion, did you Doctor?"

He answered, "I didn't see him with one, no. I saw him two or three days after the accident." (Tr. 243).

Dr. Taylor said he looked in the hospital records for a suggestion of concussion and didn't see it (Tr. 243).

He also stated that forms which he had signed containing his diagnosis did not anywhere mention a concussion (Tr. 244-245).

Since the plaintiff below complained of a mental disease or illness precipitated by, or aggravated by, a heart condition occurring on or about May, 1954, it is necessary to examine the testimony of Dr. Dornberger (Tr. 185-226), a specialist in internal medicine (Tr. 185).

Dr. Dornberger testified that he first examined the plaintiff April (he probably meant May) 24, 1954 (Tr. 187). On the basis of his examination and electrocardiogram tracings which he made at the time, he suspected the plaintiff had a mild heart attack and sent him to the Broward Hospital (Tr. 189-190).

Dr. Dornberger consulted with his associate, Dr. Roberts, who disagreed with his diagnosis and believed that the plaintiff had acute rheumatism (Tr. 192). He also consulted with Dr. Chamberlain who was uncertain as to whether the condition was acute rheumatism or a mild heart attack but leaned uncertainly to the diagnosis of a mild heart attack (Tr. 193).

He caused a great many electrocardiogram tests to be run on the plaintiff and of innumerable tracings, only one, the one taken in his office on May 24, 1954, was abnormal. All of the others were normal (Tr. 208).

Asked if the plaintiff had not made an uneventful recovery he said, "Yes, insofar as we can determine. The difficulty that we have is that as a patient, he still complains of chest pains, shortness of breath, which are subjective symptoms, and it is difficult at best in this instance to be

sure whether or not they are actually pains of coronary disease, or whether they are what we call functional pains, chest wall pains." (Tr 209).

Dr. Dornberger said that the heart attack was in the least order of severity and admitted that the diagnosis was doubtful (Tr. 210).

Dr. Dornberger acknowledged that, in arriving at his diagnosis of mild heart attack, he relied at least to some extent upon the plaintiff's statement to him that he had suffered a heart attack four years previously and also that he relied upon the plaintiff's or someone's statement that the plaintiff had suffered concussion in the accident of February 26, 1952 (Tr. 217-218).

Dr. Dornberger was also asked, "Did he mention to you at that time, Doctor, or some time during your conversations, that he wanted you to make medical reports to various insurance companies in connection with what he alleged was a total disabiliy?", and answered, "Yes, sir." (Tr. 219).

The following questions were also asked and answered on cross examination:

"Q. All of these symptoms which you present were subjective through this period, were they not?

A. With the exception of one episode, which I think is irrelevant, I had to make a house call. He had an acute renal colic. He had a kidney stone.

Q. And by subjective, again, we mean complaints which he relates to you. He is telling you that he is worried or suffering some pain or other. Those are subjective things as against the things which you can find definitely as objective symptoms. Is that correct, sir?

A. That's right." (Tr. 220).

Dr. Keedy (Tr. 310-334), testifying for the plaintiff, stated that from his examination and from the history, it

was his opinion that the plaintiff was suffering disability; that he didn't think the plaintiff was mentally operating efficiently to do any type of productive work (Tr. 322).

There are several factors in Dr. Keedy's testimony which support the finding of the jury.

The witness specializes in neurology and neuro-surgery (Tr. 311). He had been seeing the plaintiff for over three years, visits averaging about six or eight weeks (Tr. 313). He had examined the plaintiff purely for examination purposes, and not for treatment (Tr. 327). He claimed he had noticed psycho-neurotic tendencies, and some tendencies verging on being trul, psychotic (Tr. 316). The treatment of psychiatric diseases and disturbances is not within his field (Tr. 327-328). Yet he had not sent the plaintiff to a psychiatrist for treatment (Tr. 327).

He had sent plaintiff to Dr. Jarrett, a psychiatrist for evaluation (Tr. 327) but he had no report from Dr. Jarrett, does not have his conclusions after his evaluation and does not know what he found (Tr. 331).

On the plaintiff's first visit to Dr. Keedy on January 30, 1953, the witness obtained a complete history, including an account of the accident of February 26, 1952, from the plaintiff (Tr. 313-316).

He testified, "Now at that time I felt that the patient was suffering from a post concussion syndrone which was manifested by mild headaches, forgetfulness, difficulty in concentrating, and irritability." (Tr. 316).

The witness also said: "Now on his general physical examination, all of his examination was essentially negative." (Tr. 315).

Later the witness had an electro-encaphalogram run on the plaintiff "and the record that we obtained was a normal record, indicating that he hadn't sustained any ac-

tual tearing of his brain or any blood clot, or anything of an organic nature."

On cross examination the witness admitted giving a written report to the North Western Mutual Life Insurance Company on June 26, 1953, in which he answered, "No," to the question, "Is the insured now totally disabled?" To the question, "'From what date has the insured been continuously disabled?'" he answered, *"Has not been while under my care."*

The witness explained that he meant by these answers that the plaintiff was not totally physically disabled (Tr. 325).

Dr. Strain (Tr. 338-345), a specialist in surgery of the nervous system (Tr. 338), called by the defense, had examined the plaintiff as a court appointed physician (Tr. 338).

After describing a rather elaborate examination of the plaintiff (Tr. 339-341) he testified that "All his neurological examination was within normal limits." (Tr. 342).

The witness testified that he did not attempt to evaluate the psychiatric functions of the plaintiff because he is not a psychiatrist (Tr. 343).

So here we have a plaintiff who comes to a jury and says there is something wrong with him, and says in essence: I don't know exactly what it is. It may be from an accident which I had several years ago and in which I may have suffered a concussion or it may be from a light heart attack which I may have suffered. Several eminent physicians have examined me and found me physically fit. Their clinical tests indicate that there is nothing wrong with my brain or nervous system or with my heart, but I want you to pronounce me permanently and totally disabled!

Had the jury done so, it would have had to delve deeply into the realm of speculation.

The appellant in his brief, page 17, contends that since the plaintiff himself has testified to his disability, it would make no difference if all of the doctors in the world testified that he was all right. The jury would be bound to accept his testimony unless convinced he was committing perjury, and there was no evidence of perjury.

Should this contention be enunciated as law, it could lead to serious consequences and absurdities.

Any person involved in an accident could contend that he suffered pain somewhere or everywhere in his body. It would be next to impossible to prove that his ills were manufactured or imaginary even though medical experts could testify that his symptoms were not supported by clinical diagnosis, and the jury would be bound to believe and give credit to his testimony. This would be true even though he testified with his fingers crossed for his demeanor on the stand would have no bearing under such a rule.

Fortunately, such is not the law.

In *United States* v. *Burns*, 69 F. 2d 636, decided by this court, the appellee sued to recover upon a war risk insurance policy which had lapsed for non-payment of premiums eleven years prior to suit. The appellee claimed that he was totally and permanently disabled prior to the lapse of the policy. There was a judgment for the appellee and the Government appealed.

Of three physicians who testified for appellee, the testimony of two had no tendency to prove that the appellee was totally and permanently disabled at the time of the policy lapse.

The other physician, Dr. McRea, had first examined appellee ten days prior to trial for the purpose of testifying in the trial.

Dr. McRea on direct, testified "as to the appellee, when he was examined, narrating a history of his case."

He testified that, "I would consider him permanently disabled." Appellee's counsel then asked the witness: "and totally disabled from the history of his case?" The witness replied: "Yes, sir, that is, in the condition that he is in." In answer to a question from the court, this witness testified that he thought the appellee was totally disabled on November 20, 1920, when he was discharged from hospital.

In cross examination the doctor stated, "My testimony or opinion that he was totally disabled when he was discharged from the Army is based upon my examination and the record that he had at the Walter Reed Hospital."

This court said:

> "(5, 6) The above-mentioned statement by Dr. McRea of his opinion that appellee was totally disabled when he was discharged from the hospital and sent to Florida was devoid of probative value. The testimony of the witness shows that his opinion was based solely on what appellee told him a few days prior to the trial as to his injuries and bodily ailments, and on the record he had in the Walter Reed Hospital. The testimony of the witness fairly negatives the conclusion that he had any knowledge or information as to the work appellee did between the date of the lapse of the policy and the date of the examination by the witness, or as to the effect or lack of effect of that work on appellee's case. A basis of the stated opinion of the witness was a history of appellee's case which did not disclose fact which constituted a material part of the history of that case disclosed by evidence before the jury. It is fairly inferable that the case upon which the witness gave his opinion was substantially different from the one which the jury found from the evidence. The premises from which the witness reached his conclusion not including material facts disclosed by the evidence, those premises were inade-

quate to support an opinion as to the case which it is to be inferred was found by the jury from the evidence to be the real one." (cases cited).

And in *United States* v. *Shashy,* 75 F. 2d 222, decided by this court in 1935, it was held that the opinion of a physician that the appellee was totally and permanently disabled within the provisions of a war risk policy due to a paralyzed condition of one of insured's vocal chords was without probative weight.

POINT II.

A. Appellant has waived his right to object to the jury charge assigned as error by his failure to make timely objection to it (Tr. 267-268, 278, 280).

The following argument is in response to Questions II and III propounded in the appellant's brief (Tr. 23-24). As to Question II propounded by appellant, the record is silent as to any request by the appellant of an instruction with respect to burden of proof.

The pertinent portion of *Rule 51, Fed. Rules of Civil Procedure,* provides:

> "• • • No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make objection out of the hearing of the jury."

At the conclusion of the Court's charge (Tr. 280) the judge inquired, "Have there been any instructions, counsel, that you have noted that we passed over?"

Counsel for appellant answered: "I think that covers it, Judge."

The Court then asked counsel to come forward, they approached the bench out of hearing of the jury, after which the jury retired.

At that time the record reflects no objections to the charge.

Also, at the conclusion of the discussion of the instructions (Tr. 260-272) it would appear that counsel had had an opportunity to examine the intended instructions (Tr. 272) and that counsel for appellant voiced no objection at that time (Tr. 273).

In the discussion of the proposed instructions now complained of in the appellant's brief (Tr. 267), no objection to this charge is shown.

This Court has stated that timely objection to the trial court's charge must be made in order to preserve error: *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582-583, cited *supra*; *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 222 F. 2d 954, cited *supra*; *Standard Oil Co.* v. *Burleson*, 117 F. 2d 412; *Western Fire Ins. Co. of Fort Scott, Kansas*, v. *Word*, 131 F. 2d 541; *Good Holding Co.* v. *Boswell*, 173 F. 2d 395.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719, the Court said:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial • • •."

Since no specific objections were made to the Court's charge prior to the time the jury retired, the appellant

cannot at this time, on appeal, question the correctness of the charges given.

B. The jury was fairly and accurately charged as to the law in the case.

That portion of the charge which is objected to by the appellant and which is quoted on pages 24 and 25 of his brief, does not comprise the entire charge covering the appellant's right to recover.

Any objection which appellant might make to his quoted portion would appear to be cured by the portion which immediately precedes it in which the court charged (Tr. 277-278):

> "I charge you that since the policy says, ' "loss of business time," ' that ' "business time" ' in a policy insuring against loss of business time caused by accidental injury or sickness, refers to time lost from the occupation in which the insured was engaged at the time the disability was sustained, or the time lost from some other occupation in which the insured might have been able to have been engaged within the range of his normal ability, taking into consideration his education, training and work, and his physical and mental condition.
>
> "Should you find from the preponderance of the evidence that the plaintiff, as a result of injury or sickness as described in the Complaint as amended, was totally disabled by bodily injury or sickness during the period commencing September 10, 1952, through and including January 26, 1956, from engaging in his occupation as a physician, or engaging in any occupation in which he was able, taking into consideration his education, training and work, and his physical and mental condition, then you will find for the plaintiff and assess his damages at the rate of $150.00 per month for such months, if any, that you find him to have been so disabled.

"Disability from performing an occupation as used in these instructions, means substantial or practical inability to do those substantial and material acts and duties characterizing and pertaining to the occupation, and necessary to the carrying on of the occupation, whether it be the occupation in which plaintiff was engaged, or one in which plaintiff could have engaged based upon those factors mentioned by the Court.

"If the plaintiff who was insured was disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time, he can recover the monthly payments promised in the policy for the time he remained so disabled."

From the charge, taken as a whole, the jury must have readily understood that the plaintiff was entitled to recover if disabled to perform his professional duties or the duties of any occupation for which he was qualified by education, training and work.

It is quite apparent that the jury charges, taken as a whole, fairly and accurately instructed the jury as to the law applicable to the case. It has long been recognized that the true test as to the efficacy and propriety of jury charges is whether, taken as a whole, they fairly impart to the jury, a correct interpretation of the law to which they can apply the facts and not whether one, at his leisure, may with a microscope detect some minor or technical flaw which would not in any event have come to the attention of the jury or have affected in any way their decision.

The portion of the Charge to which the appellant objects would appear to have been lifted almost verbatim from *New England Mutual Life Insurance Co.* v. *Huckins*, (Fla. 1937) 173 So. 696, 700, paragraph numbered 7, 8, which portion is quoted on page 26 of appellant's brief.

D.

Conclusion.

It is respectfully submitted that in the absence of a motion by the appellant for a directed verdict and any specific objection to the charge given by the Court, there is nothing before this court for consideration and it is, therefore, urged that the judgment of the District Court be affirmed.

Respectfully submitted,

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By .....,
Of Counsel.

APPENDIX C

Appellant's Reply Brief

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 16,238

EDGAR W. STOKES, *Appellant*

v.

CONTINENTAL ASSURANCE COMPANY, an Illinois Corporation, *Appellee*

APPELLANT'S REPLY BRIEF

This reply brief is directed to the points raised by the Appellee under Points I and II.

There is no doubt that the cases cited by Appellee generally support its statement to the effect that the sufficiency of the evidence is not reviewable on appeal where a motion for a directive verdict is not made in the trial court.

The rule of these cases is inapplicable here for the reason that there was no credible testimony that warranted a verdict for the defendant.

There is no doubt that the plaintiff had the automobile accident. The defendant says that there was no proof of this fact other than the plaintiff's own statement, and says that it is rather significant that neither the police who took the plaintiff to the Clewiston Inn, nor the physician who treated him the following morning, nor Dr. Patterson were called as witnesses.

What there is significant about this we do not know. There is no testimony whatever that the plaintiff did not have the accident. What the policeman could have added to the trial is unfathomable.

Paragraph 4 of the complaint alleges that on or about February 26, 1952, plaintiff received bodily injury solely through accidental means in that he was seriously and permanently injured in an automobile accident (R. 25).

The allegations of this paragraph are denied (R. 13) but in its counterclaim the defendant said this (R. 18):

> "4. While said policy of insurance was in effect, and on or about the 26th day of February, 1952, the said Edgar W. Stokes filed a proof of claim on said policy above described, claiming and contending that he had been in an automobile accident resulting in the total loss of all his business time. The counterclaimant accepted such proof of claim as being true, and on January 14, 1953, the counterclaimant paid to the said Edgar W. Stokes the sum of $6.25 covering a period of hospitalization from February 29, to March 5, 1952; and the sum of $525.00 covering a period of disability from the date of said accident to and including September 10, 1952, less a three month excepted, or waiting period, as prescribed in said policy."

The next paragraph of the counterclaim alleged that Stokes made further demands upon the defendant for the payment of the monthly indemnity, contending that he was permanently disabled from and after September 10, 1952, and upon further investigation the defendant discovered "the following facts":

(a) Prior to the accident Stokes completely discontinued his practice as a physician and retired from said practice, and disassociated himself from the operation of the hospital previously operated by him, and at the time of the alleged accident he was not gainfully employed or engaged in any type of business, occupation or profession, nor was he devoting any time thereto so that any claimed disability did not result in the total loss of all business time so as to entitle the plaintiff to monthly indemnity.

(b) Stokes was not injured in the accident of February 26 so as to render him unfit to carry on his former business or occupation, nor was the claimed injury severe enough to render him incapable or unfit to devote all of his time to his former business or occupation.

It thus appears that actually the issues that were presented to the jury were those, or should have been those, which arose out of the allegations in the defendant's counterclaim, and that therefore it was incumbent upon the defendant to prove that Stokes had not in fact suffered a loss of business time within the terms of the policy or was not rendered incapable to carry on his former business or occupation.

Of course, the allegations in this paragraph of the counterclaim are inconsistent because if Stokes had no injury, then it makes no difference whether he was rendered unfit to continue it.

The counterclaimant prayed for a declaratory judgment declaring the rights, liabilities, duties, responsibilities and legal relations of the parties; that the reciprocal rights and liabilities be declared and determined fully in accordance with the policy of insurance, and that plaintiff be enjoined from filing and prosecuting the actions which he had previously instituted in the Civil Court of Record of Dade County, and one which was transferred to the court below and was the subject of the present suit.

We think this situation presented by the pleadings and the evidence is therefore sufficient to bring the case within the exception to the rule relied upon by the Appellee. This exception is that where the insufficiency of the evidence constitutes plain error apparent on the face of the record which if not noticed would result in a manifest miscarriage of justice, the action of the trial court in entering judg-

ment for the opposing party would be reversed (Barron and Holtzoff, Vol. 2, Sec. 1081, page 781).

Respectfully submitted,

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